Supreme Court, U.S.
FILED
061467 MAY 4 - 2007
OFFICE OF THE CLERK

No. ____

In the Supreme Court of the United States

B. WILLIS, C.P.A., INC.,
Petitioner,

v.

PUBLIC SERVICE COMPANY OF OKLAHOMA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

PETITION FOR WRIT OF CERTIORARI

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May 3, 2007

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QUESTIONS PRESENTED

Is there a procedural due process right to a predeprivation hearing in a state eminent domain case when the landowner challenges the public use of the taking?

Does the federal preemption set forth in 49 U.S.C. § 10501 preclude condemnation under state eminent domain law of either raw land for a railroad right of way or an existing railroad track and bridge?

PARTIES TO THE PROCEEDING

Petitioner

B. Willis, C.P.A., Inc., is a professional corporation wholly owned by Buck Willis, C.P.A. It has no subsidiaries.

Respondent

Public Service Company of Oklahoma is a wholly owned subsidiary of American Electric Power, Inc. a publicly traded electric utility holding company.

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OPINIONS BELOW

The decision of the Oklahoma Court of Civil Appeals (2007 OK CIV APP 18, ___ P.3d ___) was issued on September 19, 2006 and is included in the Appendix at Appendix B at 3a. The order of the Oklahoma Supreme Court denying certiorari and ordering the decision of the Oklahoma Court of Civil Appeals released for publication is unpublished and is included in the Appendix at Appendix A at 1a.

JURISDICTION

The Oklahoma Supreme Court issued its order denying certiorari on February 5, 2007. This petition for certiorari is filed within 90 days of that order. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1257 and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article I., Section 8.

The Congress shall have Power...

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

U.S. Constitution, Article VI., Section 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall

be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

U.S. Constitution, Amendment 14, Section 1.

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

49 U.S.C., § 10501 b

(b) The jurisdiction of the Board over -
(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

66 O.S. § 53

A. If the owner of any real property or interest therein, over which any railroad corporation, incorporated under the laws of this state, may desire

to locate its road, shall refuse to grant the right-of-way through and over his premises, the district judge of the county in which said real property may be situated shall, upon the application or petition of either party, and after ten (10) days' notice to the opposite party, direct the sheriff of said county to summon three disinterested freeholders, to be selected by said judge as commissioners, and who shall not be interested in a like question.

B. The condemnor shall give notice to a condemnee by personal service or by leaving a copy of the notice at the condemnee's place of residence with some member of his family over fifteen (15) years of age, or by publication in the case of a condemnee who resides out of this state or a resident of this state who has departed herefrom with intent to avoid service of notice, or whose whereabouts or identity the condemnor, or his attorney, upon diligent inquiry is unable to ascertain, or an unknown heir, successor or assign of one in whom some right, title or interest in the property concerned was possessed, by publishing such notice once a week for two (2) consecutive weeks in a newspaper authorized by law to publish legal notices in the county where the petition is filed, the ten-day period to begin with the first publication. A copy of such notice and a copy of the petition shall be mailed to such opposite party's last-known mailing address within five (5) days of the first publication thereof. The procedure for service by publication as authorized herein shall in all other respects be as provided by law for service by publication in civil actions, except summons need not first be issued.

C. The commissioners shall be sworn to perform their duties impartially and justly; and they shall inspect said real property and consider the injury which said owner may sustain by reason of the condemnation and they shall assess the just compensation to which said owner is entitled; and they shall forthwith make report in writing to the clerk of the court, setting forth the quantity, boundaries, and just compensation for the property taken, and amount of injury done to the property, either directly or indirectly, which they assess to the owner; which report must be filed and recorded by the clerk. A certified copy of the report may be transmitted to the county clerk of the county where the land lies, to be by him filed and recorded, without further acknowledgment or proof, in the manner and with like force and effect as is provided for the recording of deeds. And if said corporation shall, at any time before it enters upon said real property for the purpose of constructing said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises.

D. "Just compensation", as used in subsection C of this section, shall mean the value of the property taken, and in addition, any injury to any part of the property not taken. Any special and direct benefits to the part of the property not taken may be offset only against any injury to the property not taken. If only a part of a tract is taken, just compensation shall be ascertained by determining the difference between the fair market value of the whole tract immediately before the taking and the fair market value of that portion left remaining immediately after the taking.

66 O.S. 55

(A) The report of the commissioners may be reviewed by the district court, on written exceptions filed by either party, in the clerk's office within thirty (30) days after the filing of such report; and the court shall make such order therein as right and justice may require, either by confirmation, rejection or by ordering a new appraisement on good cause shown; or either party may within sixty (60) days after the filing of such report file with the clerk a written demand for a trial by jury, in which case the amount of damages shall be assessed by a jury, and the trial shall be conducted and judgment entered in the same manner as civil actions in the district court. If the party demanding such trial does not recover a verdict more favorable to him than the assessment of the commissioners, all costs in the district court may be taxed against him.

(B) Within ten (10) days after the report of commissioners is filed, the court clerk shall forward to the attorney of record for the condemnor, the attorney of record for each condemnee, and to all unrepresented condemnees, a copy of the commissioners' report and a notice stating the time limits for filing an exception or demand for jury trial as specified in paragraph (A) of this section. This notice shall be on a form prepared by the Court Administrator, which shall be approved by the Supreme Court, and shall be distributed to all clerks of the district court by said Court Administrator. If a party has been served by publication, the clerk shall forward a copy of the report of commissioners and notice of time limits for filing an exception or demand

for jury trial to the last-known mailing address, if any, and shall cause a copy of the notice of time limits to be published in one (1) issue of a newspaper qualified to publish legal notices, as defined in Section 106 [25-106] of Title 25. After issuing the notices provided herein, the court clerk shall endorse on the notice form filed in the case, the date and that a copy of the report together with the notice was mailed to each party or his attorney of record, or the date the notice was published in compliance with the provisions hereof.

(C) The time limits for filing an exception and demand for jury trial, as prescribed in paragraph (A) of this section, shall be calculated from the date the report of the commissioners is filed in the case. On failure of the court clerk to give notice within the time prescribed in paragraph (B) of this section, the court, on application of any party, may extend the time for filing an exception to the report or a demand for trial by jury for a period not to exceed twenty (20) days from the date the application is heard.

(D) Where the party instituting a condemnation proceeding abandons such proceeding, or where the final judgment is that the real property cannot be acquired by condemnation or if the award of the jury exceeds the award of the court-appointed commissioners by at least ten percent (10%), then the owner of any right, title or interest in the property involved may be paid such sum as in the opinion of the court will reimburse such owner for his reasonable attorney, appraisal, engineering, and expert witness fees actually incurred because of the condemnation

proceeding. The sum awarded shall be paid by the party instituting the condemnation proceeding.

STATEMENT OF THE CASE

Oklahoma's statutory eminent domain scheme is set out in Title 66 of the Oklahoma Statutes, which is entitled "*Railroads*." These statutes were originally enacted in 1890 by the legislature of the Oklahoma Territory and when the Oklahoma Territory and the Indian Territory were merged in 1907 to become the State of Oklahoma, the territorial statutes simply carried over as the original statutes of the new state.

These statutes contain no statutory procedures for a landowner to contest the taking of his property or challenge the public use of the taking. Rather, as railroad statutes written in the nineteenth century, the statutes merely presume that the taking is for a public use and thus no proceedings on that issue would be necessary. In 1935 the Oklahoma Supreme Court noted, "Condemnation procedure in this state is thus governed by statutes which, under a logical interpretation, contain no provision authorizing a determination of questions relating to the right to condemn." *Wrightsman v. Southwestern Natural Gas Co.*, 46 P.2d 925 (Okla. 1935) at ¶ 32.

However, with the *Transportation Act of 1920* Congress enacted the predecessor to the statute found today at 49 U.S.C. § 10901. Congress thereby established the requirement that a railroad could not be constructed, unless the Interstate Commerce Commission ("ICC"), and today the Surface Transportation Board ("STB"), had issued a certificate of public convenience and necessity.

In *Nicholson v. I.C.C.*, 711 F. 2d 364 (D.C. Cir. 1983) the Court reviewed the legislative history of the Act and noted that Congress found that railroads were being constructed that were not in the public interest as their economic viability was dependent on diverting traffic away from existing railroads.

Although the Oklahoma statutes did not contain any provisions for landowners to challenge the condemnation of their property, the Oklahoma Supreme Court held that landowners had a constitutional right to do so and in *Wrightsman v. Southwestern Natural Gas Co., supra* established by judicial construction that the procedure to exercise that right was to raise the issue as an exception to the report of commissioners.

In *Board of County Commissioners of Creek County v. Casteel*, 522 P.2d 608 (Okla. 1974) the Oklahoma Supreme Court made it clear that filing an exception to the report of commissioners was the only way to raise the issue of the right to take the property and any other pleading would be insufficient to raise the issue. As Justice Hodges noted in his dissent, 66 O.S. 55, the statute that authorizes filing exceptions to the report of commissioners, is only contemplating excepting to the valuation the commissioners assigned to the property being condemned, since, as previously noted, Oklahoma's railroad statutes just assume any taking is for a public use.

In the case at bar, Public Service Company of Oklahoma ("PSO") filed a condemnation proceeding for a railroad right of way across property owned by B. Willis, C.P.A., Inc., ("Willis") in the Rogers County District Court. PSO's lawyers controlled every step of the proceedings including hand picking the commissioners, and drafting both the instructions to the commissioners and the commissioners'

report. Both the report of commissioners and the payment of the amount of the commissioners' award were filed with the Rogers County Court Clerk simultaneously by PSO's lawyers. The next day the court clerk mailed a copy of the report to Willis advising him that now, for the first time, Willis had standing to appear in court to challenge the taking of its property. Willis received this notice two (2) days after PSO had deposited the amount of the commissioners' award with the court clerk and Willis promptly filed exceptions to the report of commissioners challenging PSO's right to take its property.

After PSO's attorneys, one whom was the then President Pro Tempore of the State Senate, engaged in *ex parte* communication with the District Court judge, PSO procured an order denying Willis' exceptions to the report of commissioners on the ground that Willis had no right to even be heard in defense of its property. PSO then seized the property and constructed a railroad bridge and track on the property. Willis then took three actions. Willis sought an immediate writ from the Oklahoma Supreme Court to halt PSO's destruction of Willis' property[1] that the Oklahoma Supreme Court denied. Willis then appealed the trial court's order. This ultimately led to the decision in *Public Service Company v. B. Willis, C.P.A., Inc.*, 941 P. 2d 995. (Okla. 1997). Willis also commenced litigation in the U.S. District Court for the Northern District of Oklahoma, asserting claims brought under 42 U.S.C. § 1983 based on this Court's decision in *Zinermon v. Burch*, 494 U.S. 113, 110 S. Ct. 975 (1990) that property owners are entitled to a predeprivation

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[1] To construct its railroad PSO had to make an enormous cut on Willis' property severing and removing not only a large quantity of top soil but extremely valuable deposits of coal and limestone.

hearing. This federal litigation resulted in the decision of the U.S. Court of Appeals for the Tenth Circuit found at Appendix C at 19a.

After the state appeal was remanded to the Rogers County District Court PSO and the Court simply acted as if the decision never existed and continued to ignore Willis' discovery requests. Not until 2000 did PSO produce the documents Willis had been seeking since 1993.

One of the items discovered was that PSO did not have a certificate of public convenience and necessity from either the ICC or the STB even though PSO had notified Willis by certified mail that it was condemning the property as a common carrier and the track was used by full complete unit trains in a continuous through journey.

Willis then filed a declaratory judgment action with the STB seeking a decision that the track required a certificate of public convenience and necessity under 49 U.S.C. § 10901.[2] However, after declaring at the state and local level that it was constructing the track as a common carrier, PSO filed a verified affidavit with the STB denying any common carrier

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[2] Under well developed law a track such as this requires such a certificate even if it is characterized as a "spur line." See *Texas & P. Ry. Co. v. Gulf, C. & S.F. Ry. Co.*, 270 U.S. 266, 46 S. Ct. 263 (1928); *Nicholson v. ICC*, 711 F. 2d 364 (D.C. Cir. 1983)

status for the track[3]. On the basis of this affidavit, the STB declined to assert jurisdiction over the track.

Willis then filed a motion in the Rogers County District Court challenging the jurisdiction of the Court to proceed in the case as a result of the federal preemption enacted by Congress in the ICC Termination Act and found at 49 U.S.C. § 10501. The response of the Rogers County District Court was:

> **"If you want to take that somewhere and see if there is an exception here or you have been, federal courts have taken this all over, and then let them tell me that they have."**

As a result, Willis filed another federal action in the U.S. District Court for the Northern District of Oklahoma including a declaratory judgment claim seeking a decision that the federal preemption precluded a state district court from condemning Willis' property, particularly when a railroad bridge and track had already been constructed and placed in service. In addition, Willis brought claims under 42 U.S.C. § 1983 for seizing its property in violation of its right to due process of law and equal protection of the law and for subversion of the judicial process under this Court's decision in *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 182 (1980). This case is presently on appeal to the Tenth Circuit. It was

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[3] Interestingly, in the recent decision of *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) at 2661 Justice Stevens noted: "On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad **with common-carrier duties** is a familiar example." (Emphasis added.)

fully briefed on June 9, 2006 and argued on November 15, 2006 but no decision has yet issued.

After this federal litigation was commenced, in October of 2004 the Rogers County District Court held a hearing on Willis' challenge to the taking of its property, almost 12 years after PSO filed the "commissioners[4]" report and deposited the "commissioners'" award with the court clerk. On November 15, 2004 the Court signed an order unilaterally prepared by PSO's attorneys denying Willis' exceptions. Willis then appealed this order.

On September 19, 2006 the Oklahoma Court of Civil Appeals issued its decision affirming the District Court. For purposes of this petition for certiorari there were two (2) relevant holdings. First, the Court held that, under Oklahoma law, a landowner's property is taken the instant that the condemnor deposits the commissioners' award with the court clerk. Secondly, the Court held that the STB decision finding that it did not have jurisdiction over PSO precluded application of the federal preemption provisions of 49 U.S.C. § 10501 to the proceedings in the Rogers County District Court.

Willis then filed a petition for certiorari with the Oklahoma Supreme Court. The Court issued an order on February 5, 2007 denying the application and approving the decision of the Court of Civil Appeals for publication and therefore according it precedential value.

When the decision of the Oklahoma Supreme Court under appeal here is read in conjunction with its decision in *Board*

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[4] It was prepared and filed by PSO's attorneys.

of County Commissioners of Creek County v. Casteel, supra., it is clear that Oklahoma eminent domain law allows condemnors to seize property without allowing the landowner any opportunity for a predeprivation hearing. In the case at bar the Oklahoma Supreme Court has held that Willis' property was lawfully taken two (2) days before Willis even had notice that for the first time Willis now had standing to appear in court and challenge the taking of its property that had all ready occurred.

In *Wrightsman v. Southwestern Natural Gas Co., supra.*, at ¶ 24 the Court noted:

> Manifestly, cases might arise, where possession by the condemnor would be tantamount to destruction as far as the landowner is concerned. In such cases denial of a tribunal in which to test the right to condemn prior to possession would be a denial of equal protection of the laws.

Affording a property owner a hearing to contest the taking of his property only after the property has been taken, bulldozed and destroyed is an empty, meaningless, gesture. And as this Court stated in *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314, 315 70 S. Ct. 652, 657 (1950):

> An elementary and fundamental requirement of **due process** in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and **afford them an opportunity to present their objections...**But when notice is a person's due, **process which is a mere gesture is not due process.** (Emphasis added.)

ARGUMENT FOR GRANTING WRIT

The issues presented in this petition are of great national importance both with respect to eminent domain and the scope of the federal preemption of railroad regulation. This Court has not ruled directly on either issue and state courts have taken advantage of that fact to formulate decisions that are at odds with the this Court's holding in *Zinermon v. Burch, supra.*, and the plain wording of 49 U.S.C. § 10501.

Petitioner is forced to seek relief from this Court because it has exhausted all avenues for relief in the court system of Oklahoma and, when Willis appealed to the U.S. Court of Appeals for the Tenth Circuit in prior litigation, that Court disclaimed any right to a predeprivation hearing in an eminent domain case.

ARGUMENT 1

There is a procedural due process right to a predeprivation hearing in a state eminent domain case when the landowner challenges the public use of the taking.

This court has long held that there is a procedural due process right to a predeprivation hearing whenever the state deprives a citizen of property. Cases this Court has decided have involved replevin, *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983 (1972), asset forfeiture, *U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 114 S. Ct. 492 (1993) and even a case that did not involve property, *Zinermon v. Burch*, 494 U.S. 113, 110 S. Ct. 975 (1990).

However, post *Zinermon* this Court has never directly addressed the issue of a right to a predeprivation hearing in a

case involving the actual physical invasion of real property pursuant to an eminent domain proceeding instituted in a state court. The right to such a hearing is critical given that the power is subject to abuse by politically connected economic interests.

This Court has long upheld the constitutionality of "inverse condemnation" laws. *Yearsley v. Ross*, 309 U.S. 18, 60 S. Ct. 413 (1940). These statutes permitted the seizure of private property without any legal proceedings what so ever and compelled landowners to bear the burden and expense of initiating a court proceeding to obtain compensation for their land.

As this Court has long held that eminent domain may only be used for a public purpose, *Hariston v. Danville & W.R. Co.*, 208 U.S. 598, 28 S. Ct. 331 (1908), *Missouri Pacific Ry. Co. v. State of Nebraska*, 164 U.S. 403, 17 S. Ct. 130 (1896), Oklahoma's railroad statutes just assume that any railroad is a public use. However, as the D.C. Circuit pointed out in *Nicholson v. I.C.C.*, 711 F. 2d 364 (D.C. Cir. 1983), with the enactment of the *Transportation Act of 1920*, Congress had concluded this was not the case.

In the case at bar, on January 27, 1994 Willis appeared before the Rogers County District Court for a hearing on motions to compel discovery and a motion for protective order. At the hearing the Court acknowledged that Oklahoma case law required the Court to adjudicate the public necessity of the taking of Willis' property and both the Court and PSO acknowledged that the Court and PSO's lawyers had engaged in *ex-parte* communication to dispose of Willis' challenge to PSO's right to take the property at that hearing. Subsequently, the Rogers County District Court entered an order holding that Willis had no right to challenge the taking

of its property or even be heard in defense of its property that completely contradicted long-standing Oklahoma and U.S. constitutional law. *Public Service Company v. B. Willis, C.P.A., Inc.*, 941 P. 2d 995 (Okla. 1997).

It is important to understand precisely what the state district court held. As the Oklahoma Supreme Court summarized the holding:

> PSO contended that **discovery for the landowner was irrelevant**. It argued that because it had a legislative grant to condemn property pursuant to 27 O.S. 1991 § 7, **Willis had no right to contest its taking of his land.** The trial court held in favor of PSO... (Emphasis added.) *Public Service Company v. B. Willis, C.P.A., Inc., supra.* ¶5

In the case of *Degen v. United States*, 517 U.S. 820, 828, 116 S. Ct. 1777, 1783 (1986) the Court stated:

> The right of a citizen to defend his property against attack in a court is corollary to the plaintiffs' right to sue there.

In *McVeigh v. United States*, 78 U.S. 259, 20 L.Ed. 80 (1870) the Court stated:

> In our judgment the District committed a serious error...The order in effect denied the respondent a hearing...If assailed there, he could defend there. The liability and the right are inseparable.

This Court has long held that private property may only be condemned for a public use. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S. Ct. 2321 (1984). As public

use is a judicial issue, *Sears v. City of Akron*, 246 U.S. 242, 252, 38 S. Ct. 245, 248 (1918), if the right to judicial review of the public use of a taking "is to serve its full purpose then it is clear that it must be granted at a time when the deprivation can still be prevented." *Fuentes v. Shevin*, 407 U.S. 67, 81, 92 S. Ct. 1983, 1994 (1972).

The reason that a landowner's challenge to public purpose must be adjudicated predeprivation is obvious. As the Oklahoma Supreme Court has observed:

> Manifestly, cases might arise where possession by the condemnor would be tantamount to destruction as far as the landowner is concerned. In such cases, denial of a tribunal in which to test the right to condemn prior to possession would be a denial of equal protection of the laws. *Wrightsman v. Southwestern Natural Gas Company*, supra at 929.

In *Zinermon v. Burch*, 494 U.S. 113, 132, 110 S. Ct. 975, 987 (1990) the U.S. Supreme Court stated:

> In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a post deprivation tort remedy to compensate for the taking.
>
> This Court has repeatedly held that:
>
> The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. To one who protests against the taking of his property without due process of law, it is no answer that to say in his particular case due process of law

would have led to the same result because he had no adequate defense on the merits.

Fuentes v. Shevin, 407 U.S. at 87, 92 S. Ct. at 1997, *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424. 35 S. Ct. 625, 629 (1915).

In *U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 114 S. Ct. 492 (1993) the Court addressed the constitutionality of the forfeiture of property belonging to a convicted drug dealer. The Court found a violation of the Due Process Clause due to the lack of a predeprivation hearing. The Court rejected claims that no due process violation occurred because a predeprivation hearing would have made no difference, noting:

> Fair procedures are not confined to the innocent. The question before us is the legality of the seizure, not the strength of the government's case. 510 U.S. at 62, 114 S. Ct. at 505.

After this Court's decision in *Zinermon v. Burch, supra.*, the U.S. Court of Appeals for the Eight Circuit rendered its decision in *Hroch v. City of Omaha*, 4 F. 3d 693 (8th Cir. 1993) where in the Court stated:

> Here the State could and in fact did afford Hroch a predeprivation remedy designed to protect his interest as the owner of the property sought to be condemned...After *Zinermon v Burch* *** we think it clear that the constitutional adequacy of this predeprivation remedy may be challenged under § 1983, regardless of whether a post deprivation remedy is also available. *Hroch* at 695

However, when Willis attempted to challenge the constitutional adequacy of the utter lack of a predeprivation remedy afforded Willis under Oklahoma law, the Tenth Circuit responded with the decision found at Appendix C herein.

As a result, this Court should grant certiorari and establish that there is a right under the United States Constitution to a predeprivation hearing to challenge the right to take or public use of a proposed condemnation when state eminent domain powers are invoked.

ARGUMENT 2.

The federal preemption set forth in 49 U.S.C. § 10501 precludes condemnation under state eminent domain law of either raw land for a railroad right of way or an existing railroad track and bridge.

The decision that is the subject of this petition held that the STB decision finding that it did not have jurisdiction over PSO precluded application of the federal preemption provisions of 49 U.S.C. § 10501 to the proceedings in the Rogers County District Court.

However, the application of the federal preemption is dependant not on STB jurisdiction over PSO but rather federal jurisdiction over rail transportation and remedies. While all STB jurisdiction is federal, not all federal jurisdiction is STB jurisdiction. Congress, not the STB, asserts the federal preemption of the regulation of rail transportation and rail operations. As one Court noted:

> It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority

> over **railroad operations**...**Congress** intended the preemptive net of the ICC Termination Act to be broad...**Congress'** use of broad terms...**Congress** specifically denoted its intent to **preempt state regulatory authority of wholly intrastate spur and side tracks** in the same code section...**Congress** proceeded with extreme clarity in making federal jurisdiction over intrastate tracks exclusive in the ICC Termination Act. Thus **Congress's** specificity as to intrastate tracks...There is no basis on which to argue that **Congress** intended to carve out...an exception to its otherwise broad preemption of state regulation of **railroad operations**...With the extension of exclusive federal jurisdiction over wholly intrastate tracks, one of the few railroad matters previously within the jurisdiction of the states, the ICC Termination Act evinces an intent by **Congress to assume complete jurisdiction,** to the exclusion of the states, over the regulation of **railroad operations.** *CSX Transp., v. Georgia Public Service Commission*, 944 F. Supp. 1573 (N.D. Ga. 1996) at 1581, 1582, 1583, 1584 (Emphasis added.)

In *B. Willis, C.P.A., Inc.- Petition for Declaratory Order*, STB Finance Docket NO. 34013 (served October 3, 2001), 2001 WL 1168090 at *1 and *2 the STB stated (Emphasis added.):

> **Rail operations** over the track, supplying trainloads of coal to the power plant commenced in March 1995. The **rail operations** are conducted by BNSF...[T]here is a category of **rail operations** that fall outside the Board's statutory jurisdiction. It consists of private tracks...Private tracks constitute a narrow limited category of **rail operations**.

The track at issue is controlled and operated by the BNSF Railway Company ("BNSF") pursuant to an Industrial Track Operating Agreement with PSO[5]. 49 U.S.C. §10102(6)(B) defines "railroad" to include (Emphasis added):

> the road used by a rail carrier **or operated under an agreement**;

49 U.S.C. §10102(9)(A) defines "transportation" to include (Emphasis added.):

> A locomotive, car, vehicle, ...facility, **instrumentality**, or equipment of any kind related to the movement of passengers or property or both by rail...

This Court has made it clear that the term "instrumentality" includes track regardless of ownership, so that railroad track is included in term "transportation." *United States v. Baltimore & Ohio R. Co.*, 333 U.S. 169, 176, 68 S. Ct. 494, 498 (1948).

Even though the STB disclaimed jurisdiction over the track at issue the law is clear that states are still precluded from exercising jurisdiction in the face of the federal preemption. In *Cities of Auburn and Kent, Wa-Petition For Declaratory Order-Burlington Northern Railroad Company-*

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[5] All dispatching over the track is controlled from BNSF's operation center in Fort Worth, Texas.

Stampede Pass Line, STB Finance Docket No. 33200 (July 1, 1997), 2 S.T.B. 330[6] the STB stated:

> Petitioners complain that our decision in *King County* creates a regulatory void that Congress could not have intended. In such instances, according to the Cities, the states may impose their own oversight authority...As an example, petitioners maintain that states have residual regulatory authority over **spur** or switching tracks **that are excepted from our jurisdiction**...When sections 10906 and 10501(b)(2) are read together, it is clear that Congress intended to remove our authority over the entry and exit of these auxiliary tracks, **while still preempting state jurisdiction over them**...Thus, although **we may not regulate the construction and disposition of spur** and switching tracks, it is equally clear that **state and local authorities may not regulate those activities either..."**
> *Cities of Auburn and Kent, Wa.*, 2 S.T.B. 330 at 341, 342. (Emphasis added.)

See also *Fletcher Granite Company, LLC- Petition for Declaratory Order*, STB Finance Docket No. 34020 (served June 29, 2001) and *Flynn v. Burlington Northern Santa Fe Corporation*, 98 F. Supp. 2d 1186 (E.D. Wash. 2000). In *Flynn* the Court noted at 1189:

> The STB has addressed 49 U.S.C. § 10501 and 49 U.S.C. § 10906 and concluded that Congress intended that neither the STB nor local authorities could

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[6] The decision may also be found at 1997 WL 362017.

> regulate the construction and disposition of spur and switching tracks, i.e. auxiliary tracks.

For purposes of federal railroad regulation, it has long been held that condemnation is construction.

> We agree with the court in Tampa Phosphate that the condemnation of right-of-way to construct a railroad line is "construction"... *Nicholson v. Missouri Pacific Railroad Company*, 366 ICC 69 (1982) at 71.

As a result neither state nor local authorities may regulate condemnation for and disposition of spur and switching tracks, i.e. auxiliary tracks.

In addition to condemnation of right of way being considered part of the construction process for railroads, this court has long held that it is also considered regulation. In *Cherokee Nation v. Southern Kansas Railway Company*, 135 U.S. 641, 10 S. Ct. 965 (1890) Congress had authorized the construction of a railroad across what was then the Indian Territory and is present day Oklahoma using federal eminent domain. The Cherokee Nation brought an action challenging the project on numerous grounds, including that the power of eminent domain could not be exercised in this manner. This Court disposed of this claim in the following language:

> But it is said that the objects for which the act of 1884 was passed are not such as admit of the exercise of the right of eminent domain. This contention is without merit. Congress has power to regulate commerce not only with foreign nations and among the serveral states., but with the Indian tribes...
> *Cherokee Nation v. Southern Kansas Railway Company*, 135 U.S. at 657, 10 S. Ct. at 971.

In *Wisconsin Central Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009 (W.D. Wis. 2000) the Court found that 49 U.S.C. § 10501(b) precluded condemnation of an existing track under state law stating:

> The Courts holds that condemnation is construction. In using state law to condemn the track, defendant is exercising control-the most extreme type of control-over rail transportation as it is defined in section 10102(9).
> *Wisconsin Central Ltd.* at 1013

Obviously, the City of Marshfield, Wisconsin is not a common carrier and the STB has no jurisdiction over it. None the less, the federal preemption still applied when the City sought to condemn a railroad track just as the preemption applies even though the STB has no jurisdiction over PSO.

In the case at bar possession and control of the track in question was turned over to BNSF in March of 1995. Not until October of 2004 did a state court hold a hearing on Willis' challenge to the taking of Willis' property with the Court's order not issuing until November 15, 2004.

PSO has always contended that the public use justification for condemning Willis' property was to create competition between BNSF and Union Pacific to drive coal hauling rates down. Since Willis challenged the public use justification of the taking, a state official had to adjudicate the public necessity of creating this competition between rival interstate common carriers. In a sworn affidavit BNSF attested that the existence of the track across Willis' property shifted "millions of dollars in annual revenues" between BNSF and Union Pacific.

However, this Court has long held that the promotion of railroad traffic and the creation of competition is regulation of railroad transportation. *Dayton-Goose Creek Ry. Co. v. United States*, 263 U.S. 456. 44 S. Ct. 169 (1924), *California v. Central Pacific Railroad Company*, 127 U.S. 1, 8 S. Ct. 1073, *Cherokee Nation v. Southern Kansas Railway Company, supra.*

Even the Oklahoma Court of Civil Appeals has held that the federal preemption provisions of the ICC Termination Act preempted all state economic regulation of rail transportation. See *Oklahoma Corporation Commission v. Burlington Northern and Santa Fe Railway Company*, 24 P. 3d 368 (Ok Civ App 2001).

As a result of the federal preemption codified at 49 U.S.C. § 10501, Oklahoma's railroad regulatory laws, pursuant to which PSO claims to have condemned Willis' property, are preempted and the Rogers County District Court's order of November 15, 2004 is void for lack of subject matter jurisdiction.

CONCLUSION

The decision of the Oklahoma Supreme Court establishes that under Oklahoma eminent domain law property may be seized and destroyed without any predeprivation hearing permitting the property owner to defend the property. In addition, that decision reflects a complete rejection of the federal preemption of the regulation of rail transportation. This decision ignores the prior decisions of this Court and clear federal statutes. Certiorari should be granted and the state decision reversed.

Respectfully Submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 101,557

[Filed February 5, 2007]

PUBLIC SERVICE COMPANY OF OKLAHOMA, Plaintiff/Appellee,	)
v.	)
B. WILLIS, C.P.A., INC., Defendant/Appellant.	)

ORDER DENYING CERTIORARI AND APPROVING COURT OF CIVIL APPEALS OPINION FOR PUBLICATION AND ACCORDED PRECEDENTIAL VALUE

PART I

¶1 Now before the Court is the Petition for Writ of Certiorari of Appellees. After review thereof the Petition is denied.

PART II

¶2 The opinion of the Court of Civil Appeals, Division (II), by John F. Fischer, J., rendered on September 19, 2006, pursuant to 20 O.S. 2001, § 30.5, is approved for publication in the official reporter and therefore accorded precedential value.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 5TH DAY OF FEBRUARY, 2007

/s/ James E. Edmondson
Vice Chief Justice

¶3 WINCHESTER, C.J., EDMONDSON, V.C.J., LAVENDER, HARGRAVE, KAUGER, WATT, TAYLOR and COLBERT, JJ., concur.

¶4 OPALA, J., dissents

APPENDIX B

IN THE COURT OF CIVIL APPEALS
OF OKLAHOMA
DIVISION II

Case Number: 101,557

[Filed September 19, 2006]

PUBLIC SERVICE COMPANY OF OKLAHOMA, Plaintiff/Appellee,	)
vs.	)
B. WILLIS, C.P.A., INC., Defendant/Appellant.	)

APPEAL FROM THE DISTRICT COURT OF
ROGERS COUNTY, OKLAHOMA

HONORABLE JAMES D. GOODPASTER,
TRIAL JUDGE

AFFIRMED

Stratton Taylor
Mark H. Ramsey
Clinton D. Russell
TAYLOR, BURRAGE, FOSTER,
MALLETT, DOWNS & RAMSEY
Claremore, Oklahoma For Plaintiff/Appellee

William T. Dickson,
Tulsa, Oklahoma For Defendant/Appellant.

JOHN F. FISCHER, JUDGE. WISEMAN, P.J., and GOODMAN, J., concur.

OPINION BY: JOHN F. FISCHER, JUDGE:

¶1 Defendant, B. Willis, C.P.A., Inc. (Willis), appeals from an appealable final order of the Trial Court denying Willis's Motion to Dismiss and overruling his Objection and Amended Objection to the Report of Commissioners in a condemnation proceeding brought by Public Service Company of Oklahoma (PSO) to gain an easement to Willis's property for the construction of a railroad. Based on our review of the record on appeal and applicable law, we affirm.

BACKGROUND FACTS

¶2 PSO commenced this condemnation proceeding in 1992 to acquire an easement across property owned by Willis, for the purpose of building a thirteen-mile railroad spur to transport coal to its Oologah power plant. In its petition, PSO alleged that it is a public service corporation duly authorized under 66 O.S. 1991 §§ 51-60 and 27 O.S. 1991 § 7,[1] to exercise the

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[1] Hereafter, unless otherwise noted, we will cite to the current version of the statutes.

power of eminent domain, that its acquisition of Willis's property is necessary for a public purpose and that its efforts to secure the right-of-way by private purchase had been unsuccessful.

¶3 Commissioners were appointed and filed their report pursuant to 66 O.S. 2001 § 53. PSO paid the award into court on December 28, 1992, the same day the report was filed. Willis filed exceptions to the Commissioners' report as permitted by section 55, and alleged that the proposed taking of his property was not for a public use or reasonably necessary therefor and demanded a jury trial. The Trial Court held in favor of PSO and Willis commenced the first of numerous appeals in various state and federal tribunals and, some of which, continue as of the date of this opinion.

¶4 In June 1997, the Oklahoma Supreme Court issued an opinion concluding that Willis was wrongfully denied a fair opportunity to challenge PSO's "asserted but unproven right to take his property as well as the right to conduct discovery," and reversed and remanded for further proceedings. *Pub. Serv. Co. of Okla. v. B. Willis, C.P.A., Inc.*, 1997 OK 78, ¶21, 941 P.2d 995, 1000 (Willis I). Pursuant to that direction and after further proceedings and discovery, on October 14, 2004, the Trial Court conducted a hearing on Willis's motion to dismiss and his exception and amended exception to the Report of the Commissioners. On November 15, 2004, the Trial Court entered its order finding that PSO had established that its condemnation of Willis's property was

for a public use and overruled Willis's motion to dismiss and exceptions.[2] Willis again appeals.

¶5 In his brief-in-chief, Willis asserts four propositions for review:[3] (1) His property cannot be valued until PSO establishes its right to condemn, and the Supreme Court's 1997 reversal in Willis I established, as a matter of law, that PSO trespassed when it constructed the railway spur on his property; (2) The Trial Court was without jurisdiction to enter the 2004 Order because federal law preempted any exercise of State law; (3) The condemnation should be set aside because PSO engaged in fraud, abuse and oppression; and (4) A new appraisal of the condemned property should be ordered.

STANDARD OF REVIEW

¶6 The standard of review for condemnation proceedings is well established. As noted by the Court in Willis I, condemnation proceedings involve both factual determinations and legal rulings. "The necessity, expediency and propriety of exercising the power of eminent domain are questions of general public policy and are governed by statute." *Willis* at ¶20, 941 P.2d at 1000. "Whether it is necessary to take particular property for the economic and efficient accomplishment of a lawful public purpose is a question of fact to be determined from the attendant facts and

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[2] Still pending before the Trial Court at the time of this appeal is Willis's demand for jury trial regarding the value of his property taken by PSO.

[3] Allegations of error set forth in the petition in error but not briefed by the appellant are deemed waived. *Oklahoma City Urban Renewal Auth., v. City of Oklahoma City,* 2005 OK 2, 110 P.3d 550, n.9, 2005 OK 2, 110 P.3d 550, 554 n.9.

circumstances developed by the evidence." *Id.* at ¶18, 941 P.2d at 1000.

¶7 "Under our constitutional provisions and cases interpreting them, the issue of whether a proposed taking is for a 'public use' is a judicial question." *Id.* at ¶19, 941 P.2d at 1000 (citing *McCrady v. Western Farmers Elec. Coop.*, 1958 OK 43, 323 P.2d 356). *See also Sublett v. City of Tulsa,* 1965 OK 78, ¶34, 405 P.2d 185, 196; *Arthur v. Bd. of Comm'rs of Choctaw County,* 1914 OK 181, 43 Okla. 174, 141 P. 1.

¶8 "A valid declaration of necessity by the appropriate body will be viewed as conclusive by the courts in the absence of a showing of actual fraud, bad faith, or an abuse of discretion by the condemning authority." *Willis* at ¶20, 941 P.2d at 1000, (citing *Rueb v. Oklahoma City,* 1967 OK 233, 435 P.2d 139)).[4] "The findings of the trial court on the issue of the necessity of the taking will not be disturbed on appeal where there is evidence to support such findings." *Id.* at ¶18, 941 P.2d at 1000, (citing *City of Tulsa v. Williams,* 1924 OK 136, 100 Okla. 116, 227 P. 876).

DISCUSSION

¶9 The power of eminent domain lies dormant with the State "until such time as the Legislature by specific enactment delineates the manner and through whom it may be

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[4] The value of the condemned property is also a question of fact and, at the request of the land owner, may be tried to a jury. Okla. Const. art. 2, § 24; 66 O.S. 2001 § 55. Willis's exceptions to the award of the Commissioners was tried to the Court, and Willis does not claim in this appeal that he properly requested but was denied a jury trial on that issue.

exercised." *City of Tahlequah v. Lake Region Elec. Coop., Inc.*, 2002 OK 2 ¶7, 47 P.3d 467, 471 (footnote omitted). *See also City of Pryor Creek v. Pub. Serv. Co. of Okla.*, 1975 OK 81 ¶9, 536 P.2d 343, 345-46. Condemnation is a proceeding strictly controlled by the Constitution and statues prescribed by the Legislature. *Willis* at ¶16, 941 P.2d at 999.

¶10 Any governmental body subordinate to the State, which would include PSO (17 O.S. 2001 § 151(c)), may not exercise a power of eminent domain in the absence of statutory authority. *Bd. of County Comm'rs of Muskogee County v. Lowery*, 2006 OK 31, ¶10, 136 P.3d 639, 646. The Legislature has authorized PSO to, and specified the manner in which PSO may, exercise the power of eminent domain. Any corporation licensed to do business in Oklahoma to furnish electricity[5] is granted the same power of eminent domain as that granted to railroads. 27 O.S. 2001 § 7; 66 O.S. 2001 § 57.

¶11 The procedure by which railroads are authorized to exercise the power of eminent domain has been established by the Legislature. 66 O.S. 2001 §§ 51-60. Superimposed on this statutory procedure are the constitutional limitations of Sections 23 and 24 of Article II of the Oklahoma Constitution, *Allen v. Transok Pipe Line Co.*, 1976 OK 53, ¶12, 552 P.2d 375, 379, and the appropriate provisions of the United States Constitution. Okla. Const. art. 1, § 1.

¶12 When interpreting the relevant taking authority, we are guided by the longstanding general rule of strict statutory

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[5] According to the Trial Court's findings, unchallenged by Willis in this appeal, PSO is licensed to do business in Oklahoma for the purpose of generating electricity.

construction applicable to eminent domain statutes. *City of Cushing v. Gillespie,* 1953 OK 121, 208 Okla. 359, 256 P.2d 418. In addition, we generally construe our state constitutional eminent domain provisions strictly, in favor of the owner and against the condemning party. *Stinchcomb v. Oklahoma City,* 1921 OK 154, ¶0, 81 Okla. 250, 198 P. 508, 508 (Syllabus 1 by the Court). The issues raised by Willis in this appeal are to be resolved within the framework of these legal principles.

PROPOSITION I

¶13 In Proposition I, Willis challenges the Trial Court's November 2004 Order, principally because he contends the "date of take" used for the valuation of his property was in error. He comes to this conclusion by arguing that although his property was valued as of December 28, 1992, the date the Commissioners filed their Report, PSO's right to condemn was not established until November 15, 2004, when the Trial Court entered the order that is the subject of this appeal. From this, he concludes not only that the date of valuation was six years premature, but also that until PSO's right to condemn was established, PSO was a trespasser on his property when it constructed the rail spur.[6] Willis misinterprets the effect of the Supreme Court's ruling in Willis I.

¶14 Following the filing of PSO's 1992 Petition for Condemnation, the Trial Court appointed commissioners

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[6] Willis extends this argument to support his claim of ownership of the portion of the rail spur crossing his property but has neither sought nor preserved for appeal any ruling of the Trial Court addressing this issue. Therefore, we are not required to consider this argument. Okla. Sup. Ct. R. 1.26, 12 O.S. 2001, ch. 15, app. 1.

pursuant to 66 O.S. 2001 § 53 to value the portion of Willis's property that PSO was seeking to condemn. The Commissioners' Report was filed with the Trial Court on December 28, 1992 and PSO paid the amount of the award to the Court Clerk on that date. The payment of that award authorized PSO to enter onto Willis's property to construct its rail spur regardless of Willis's subsequent appeal. 66 O.S. 2001 § 56. Payment to the Court Clerk in lieu of payment to the owner is a procedure authorized not only by statute, but also by the Oklahoma Constitution. Okla. Const. art. 2, § 24. The Trial Court held a hearing on January 27, 1994, to determine PSO's right to take Willis's property in light of his exceptions to the Commissioners' Report. Some twelve years later, that issue remains before this Court.

¶15 The Oklahoma Supreme Court's decision in Willis I established only that Willis had been "denied an opportunity to challenge PSO's asserted but unproven right to take his property" in the 1994 hearing. *Willis* at ¶21, 941 P.2d at 1000. Pursuant to the direction of the Oklahoma Supreme Court, the Trial Court provided Willis that opportunity. In this appeal, Willis does not contend that the Trial Court failed to provide the relief ordered in Willis I. He argues only that the Trial Court reached the wrong result.

¶16 In its order of November 15, 2004, the Trial Court found that PSO had established its right to condemn Willis's property. Consequently, the right to condemn Willis's property first "asserted" by PSO in its 1992 petition was ultimately "proven" to the satisfaction of the Trial Court at the hearing on October 14, 2004. "The findings of the trial court on the issue of necessity of the taking will not be disturbed on appeal where there is evidence to support such findings." *Id.* at ¶18, 941 P.2d at 1000.

¶17 There is nothing in the Oklahoma Constitution, the applicable condemnation statutes or Willis's submissions in this appeal that precludes the establishment of the right to condemn at a date subsequent to the date the condemned property is valued. That is, in fact, the required procedure. Within thirty days after a commissioners' report is filed, an aggrieved party may file exceptions to the report and/or within sixty days request a jury trial on the amount of the award. 66 O.S. 2001 § 55. This procedure offers Willis an opportunity to challenge both PSO's right to take his property and the value of his condemned property as determined by the Commissioners.

¶18 Further, we note that Willis has obtained a determination from the United States Court of Appeals for the Tenth Circuit that the United States Constitution does not require pre-taking compensation. *B. Willis, C.P.A., Inc. v. Pub. Serv. Co. of Okla.*, No. 97-5107, 182 F.3d 931 (Table), 1999 WL 335207 (10th Cir. May 27, 1999), *cert. denied*, 528 U.S. 1003, 120 S. Ct. 496 (1999).[7] As in this case, Willis

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[7] In resolving the federal issue, the Tenth Circuit, in an unpublished opinion, determined that the United States Constitution does not require pre-taking compensation if the State provides a reasonable and adequate provision for obtaining compensation after the taking. Citing *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), and *Biddison v. City of Chicago*, 921 F.2d 724, 727 n.4 (7th Cir. 1991), the Tenth Circuit found that Oklahoma's eminent domain procedures are not "complete" until (1) the condemnor's right to take is finally resolved and (2) the amount of the condemnation award is determined. Because determination of the award generally occurs after the condemnor has taken possession, any failure by the State to provide adequate compensation can only be determined after the

argued to the Tenth Circuit that PSO was not entitled to possession of his property until its right to condemnation had been finally determined, citing *Town of Ames v. Wybrant,* 1950 OK 197, 203 Okla. 307, 220 P.2d 693, to support that argument. The Tenth Circuit did not find *Wybrant* to be inconsistent with other Oklahoma Supreme Court cases uniformly accepting the pre-taking procedure authorized by section 53(C). We come to the same conclusion as the federal court. *Wybrant* does not hold that section 53(C) is unconstitutional.

¶19 Oklahoma's eminent domain statutes are consistent and coherent. They provide Willis a right to appeal the condemnation before final determination of all the issues that may be raised in the Trial Court without the requirement of posting a bond.[8] The same statutes provide PSO a right to take at least temporary possession[9] of the condemned property on payment of the condemnation award. This legislative program ensures that public works on condemned property can continue[10] subject to judicial review and without prejudice to

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taking and only at that point would any federal issue be ripe for review. *B. Willis, C.P.A., Inc. v. Pub. Serv. Co. of Okla.,* No. 97-5107, slip op. at 3, 182 F.3d 931 (Table), 1999 WL 335207 (10th Cir. May 27, 1999), *cert. denied,* 528 U.S. 1003, 120 S. Ct. 496 (1999).

[8] Okla. Const. art. 2, § 24.

[9] As discussed in Proposition IV, a condemnor who takes possession of condemned prop rty proceeds at its own risk until a final non-appealable judgment confirming its right to condemn the property has been entered. The statutory system in this State permits the condemnor to take that risk if it so chooses.

[10] 66 O.S. 2001 § 56.

the condemnee's right to raise any issue in that review. This system is not inconsistent with the Oklahoma Constitution, and, as noted by the Tenth Circuit, it is permitted by the United States Constitution.

¶20 We find that there is sufficient evidence to support the Trial Court's finding that PSO was entitled to take Willis's property for the purpose of constructing a rail spur and that the Trial Court's ruling that this constituted a public use justifying condemnation is correct as a matter of law. Willis's argument that the value of his property must be determined as of the date of the Trial Court's order determining PSO's right to take that property is not supported by law.

¶21 Just as the necessity of taking under eminent domain must be "determined by conditions existing at the time of the taking," *Willis* at ¶18, 941 P.2d at 1000, so also the value of the taken property can only be determined as of the time of the taking. Willis confuses PSO's taking of his property with the confirmation of that right by the Trial Court. The Trial Court correctly determined, as a matter of law, that Willis's property should be valued as of the date the Commissioners completed their valuation, and the Court Clerk properly filed and recorded their Report. 66 O.S. 2001 § 53(C). Based on this valuation, the date PSO took Willis's property is determined by the date PSO paid the Commissioner's award. *State ex rel. Dept. of Transp. v. Post*, 2005 OK 69, 125 P.3d 1183.

PROPOSITION II

¶22 Willis next argues that the Trial Court was without jurisdiction to enter its November 2004 Order because federal regulation of railroads preempts any assertion of State authority over the rail spur constructed by PSO. This

argument is precluded by an adverse ruling Willis obtained from the Surface Transportation Board (STB).

¶23 On February 15, 2001, Willis filed a Petition for Declaratory Order with the STB asking it to declare that PSO's rail spur had been improperly constructed because PSO had not first obtained authority from the STB to construct that spur. Willis's Petition was denied by Order dated October 1, 2001, in which the STB found that, while it had jurisdiction over transportation by a rail carrier, PSO was not a rail carrier. The STB concluded that in its construction and operation of the spur, PSO was not subject to the STB's jurisdiction because the spur was a private track. *B. Willis, C.P.A., Inc. Petition for Declaratory Order,* 2001 WL 1168090 (S.T.B. Oct. 16, 2001) (No. 34013).

¶24 Willis sought to reopen this decision in June of 2002. The STB concluded that the "new" evidence Willis sought to introduce was neither new nor previously unavailable to Willis and that, regardless, the newly proffered evidence did not lead to any different conclusion than the STB had reached in October of 2001:

> Thus, as the October 2001 decision correctly concluded (at 4), where, as here, "a shipper does not hold out to provide common carrier railroad service over a line it constructs and maintains to serve its own facility, and no other shippers are served by the line, then neither that construction, nor a railroad's operation over that track to reach the shipper's facility, requires ICC or Board authorization or approval."

B. Willis, C.P.A., Inc. - Petition for Declaratory Order, 2002 WL 1730018 (S.T.B. July 23, 2002) (No. 34013).

¶25 Unsatisfied, Willis appealed the STB's decision to the United States Court of Appeals for the D.C. Circuit, which affirmed in an unpublished opinion finding that the STB did not have jurisdiction over the Willis/PSO dispute. *B. Willis, C.P.A., v. Surface Transp. Bd.*, 51 Fed. Appx. 321, 51 F.App'x 321 (D.C. Cir. 2002). The D.C. Circuit denied Willis's petition for rehearing and petition for rehearing *en banc* and the United States Supreme Court denied certiorari. *B. Willis, C.P.A., Inc., v. Surface Transp. Bd.*, 540 U.S. 811, 124 S. Ct. 51, 157 L. Ed. 2d 23 (2003). Willis has had his day in court on this issue. He may not be satisfied with the result, but he is, nonetheless, bound thereby and may not re-litigate the findings of the STB in the courts of Oklahoma. *Constant v. U.S.*, 929 F.2d 654, 657 (Fed. Cir. 1991); *Nat'l Diversified Bus. Servs., Inc. v. Corp. Fin. Opportunities, Inc.*, 1997 OK 36, 946 P.2d 662. Absent federal jurisdiction over PSO in its construction and operation of this rail spur, there is no basis for federal preemption of the proceedings in the Trial Court.

PROPOSITION III

¶26 Willis next argues that the Trial Court should have found that PSO had engaged in fraud and abuse and oppression, and should have refused to confirm PSO's exercise of its eminent domain power on that basis. To advance this argument, Willis asserts that PSO did not have authority as a public utility to cross a public road, street or highway. Willis does not argue that any "public road, street or highway" crossed by PSO is located on his property. The issue before the Trial Court, and in this appeal, is PSO's right to condemn Willis's property. The Trial Court's determination that, as a matter of law, PSO had the power of eminent domain to condemn Willis's property is correct. 27 O.S. 2001 § 7; 66 O.S. 2001 § 57; *Tuttle v. Jefferson Power*

& Improvement Co., 1912 OK 232, 31 Okla. 710, 122 P. 1102. Willis has pointed to no representation by PSO that fraudulently enabled it to use the power of eminent domain granted to it by the Legislature.

¶27 Willis's assertion of oppression by PSO is equally unpersuasive. Although it took, as Willis notes, seven years and an appeal to the Oklahoma Supreme Court, Willis recognizes, in his brief-in-chief, that he was permitted to conduct discovery and "afforded a hearing [on] October 14, 2004." He points to no defect in that proceeding that affected his constitutional right to challenge PSO's condemnation of his property. As noted above, there is ample evidence in the record to support the Trial Court's conclusion that PSO had lawfully exercised its power of eminent domain in condemning Willis's property. Consequently, we are required to leave that decision undisturbed on appeal. *Willis* at ¶18, 941 P.2d at 1000.

PROPOSITION IV

¶28 Willis includes five separate arguments in support of his final proposition that a new appraisal should be ordered: (1) The Commissioners in this case were selected by PSO and not the Trial Court as required by 66 O.S. 2001 § 53; (2) The instructions to the Commissioners wrongfully precluded them from considering information from the landowners; (3) The Commissioners failed to value only the easement being condemned by PSO; (4) The Commissioners failed to consider the value of coal, limestone and topsoil removed from Willis's property by PSO during construction of its rail spur; and (5) The Commissioners' Report fails to consider the value of the rail spur bridge constructed on Willis's property, which he claims ownership of by virtue of Willis I.

¶29 The Trial Court considered Willis's challenge to the manner in which the Commissioners were appointed and rejected Willis's argument in its Order of November 14, 2004. There is sufficient evidence in the record to support the Trial Court's finding on this issue and it will not, therefore, be disturbed on appeal. *Willis* at ¶18, 941 P.2d at 1000.

¶30 As PSO correctly points out, the issue before the Trial Court at the October 2004 hearing was PSO's right to condemn Willis's property, not the value of the property condemned. Based on the record before this Court, the Trial Court has yet to reach the second issue. Consequently, at the time of this appeal, there was no judgment or appealable order that would be relevant concerning arguments two through four of Willis's Proposition IV. Those arguments were premature in the Trial Court proceedings from which this appeal was taken and need not be considered here.

¶31 Willis's final argument in Proposition IV is a variation of the argument asserted in Proposition I and dependent on his misinterpretation of the effect of Willis I. The Trial Court's 1992 Order was a final, appealable order. 12 O.S. 2001 § 953. Willis was entitled to appeal from that Order and could have stayed the effect of that Order by posting a bond, 12 O.S. 2001 § 990.4, but he was not required to do so. Okla. Const. art. 2, § 24; 66 O.S. 2001 § 56. Nonetheless, Willis's appeal, without posting a bond, did not "delay the prosecution of the work." 66 O.S. 2001 § 56.

¶32 PSO was entitled to rely on the Trial Court's Order and construct its rail spur. Until reversed on appeal, the Order of the Trial Court was presumed correct. *Hamid v. Sew Original,* 1982 OK 46, ¶¶6-7, 645 P.2d 496, 497. And Willis's appeal did not stay or suspend the effectiveness of that Order, particularly in light of the authority to proceed

with the work granted in section 56. *Davis v. Rowland,* 1952 OK 144, ¶5, 207 Okla. 19, 246 P.2d 376, 377. PSO could have proceeded with the work at its own risk until its "asserted" right to condemn was "proven" to the satisfaction of the Trial Court and recorded in a final non-appealable judgment. The authorities cited by Willis clearly support his argument on this point. Just as clearly, however, PSO was not prevented by law from taking that risk. The Trial Court has now confirmed PSO's right to condemn Willis's property and construct a rail spur with any necessary bridges. We affirm that ruling.

CONCLUSION

¶33 There is sufficient evidence in the record to support the Trial Court's finding that PSO's taking was for a public purpose as well as for its refusal to set aside that finding based on Willis's claims of fraud, abuse and oppression, and irregularity in the appointment of the Commissioners. The exercise of jurisdiction by the Trial Court was not preempted by federal law. The Trial Court's confirmation of PSO's exercise of its power of eminent domain was correct as a matter of law, and we affirm.

¶34 AFFIRMED.

WISEMAN, P.J., and GOODMAN, J., concur.

September 19, 2006

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 97-5107
(D.C. No. 96-CV-59-E)
(N.D. Okla.)

[Filed May 27, 1999]

B. WILLIS, C.P.A., INC., Plaintiff-Appellant,	)
v.	)
PUBLIC SERVICE COMPANY OF OKLAHOMA, AN OKLAHOMA CORPORATION; BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, A FOREIGN CORPORATION, Defendants-Appellees.	)

ORDER AND JUDGMENT*

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and

Before TACHA and BALDOCK, Circuit Judges, and GREENE,** Senior District Judge.

The panel previously abated this appeal in deference to related state court eminent domain proceedings which might have obviated or perhaps clarified some of the issues raised in the case. However, timely resolution of the state action has not ensued. After making its way through the Oklahoma appellate courts, that proceeding is now back in the trial court awaiting redetermination.

Upon further review of the record on appeal, the briefs, and the parties' subsequent submissions, the panel concludes that proper grounds for immediate disposition of the appeal are present but have been obscured by the presence of many overlapping/redundant claims which are not ripe for adjudication. For reasons explained below, we affirm the decision of the district court, though we clarify that the dismissal of the bulk of this case, which is dictated by constitutional constraints on subject matter jurisdiction, is without prejudice.

Background

Oklahoma's statutory scheme for eminent domain, Okla. Stat. Ann. tit 66, §§ 51-66, authorizes railroad corporations (and utilities, *see* Okla. Stat. Ann. tit 27, § 7) to take real property by condemnation, The procedure may be outlined in pertinent part by the following steps: (1) the condemnor

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judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

** Honorable J. Thomas Greene, Senior District Judge, United States District Court for the District of Utah, sitting by designation.

corporation applies to the district judge, with notice to the landowner, for selection of a three-person commission; (2) the commissioners inspect the property, assess just compensation for the injury involved, and file a report with the clerk of the court, which is promptly forwarded to interested parties; (3) if the condemnor pays the assessed sum, it may take immediate possession consistent with its proposed use, though all parties retain the right to challenge the commission's report; (4) review may be sought in the district court by filing written exceptions to the report or a demand for jury trial; (5) the district court's final judgment (approving compensation or denying condemnation) is subject to appeal, but such review shall not delay the condemnor's use of the Property if approved, so long as the assessed compensation has been paid.

Defendant Public Service Company of Oklahoma (PSO) commenced an eminent domain proceeding to condemn and acquire an easement over plaintiff's property to build a railroad spur for transporting coal to one of its power plants. After the first three steps of the process were concluded, plaintiff sought review in state court both by exception and jury demand, alleging that the proposed taking was not for a public use nor reasonably necessary for the use claimed. Plaintiff also challenged the amount of compensation assessed. The trial court ruled in favor of PSO, and plaintiff appealed. He also sought interim equitable relief from the Oklahoma Supreme Court, which denied his requests. While the appeal was pending, PSO completed the railroad spur and put it in use (particularly by defendant Burlington Northern Railroad Company (BN), as PSO's licensee). When plaintiff threatened to interfere with the operation, PSO obtained an injunction against him. Ultimately, the Oklahoma Supreme Court reversed the judgment of condemnation, holding that the trial court had erroneously relieved PSO of the initial burden of

proof and compounded that error by denying plaintiff discovery of pertinent materials. *See Public Serv. Co, v. B. Willis, C.P.A., Inc.*, 941 P.2d 995 (Okla. 1997). On remand, the state trial court refused to dissolve the existing injunction against plaintiff's interference with PSO's operation, and the Oklahoma appellate courts have affirmed that ruling. However, the trial court has yet to issue any final decision on the merits of the condemnation.

In the meantime, plaintiff filed these proceedings in federal district court, alleging numerous Constitutional claims against PSC under 42 U.S.C. § 1983 and a trespass claim against BN. The district court identified the crux of the case to be plaintiff's assertion that he was constitutionally entitled to a final judicial determination on condemnation before PSO could take possession of the easement over his property. In the district court's view, no federal right was implicated under the circumstances and, consequently, PSO's current possession, and BN's licensed use, was not actionable.

On this appeal, plaintiff continues to argue that the state condemnation proceedings are constitutionally invalid, violating his rights to due process, equal protection, access to the courts, and free speech. He also claims that, as PSO could not have acquired a valid right to possession through such proceedings, BN has no derivative licensee defense to the trespass claim. Finally, he contends that the state court order, enjoining his interference with PSO's operations violates his First Amendment right of free speech. We conclude that most of these claims are not ripe for adjudication, and the remainder lack merit. Accordingly, we affirm the district court's decision dismissing, the case.

Ripeness

Virtually all of plaintiff's complaints derive, in one way or another, from the eminent domain proceeding prosecuted by PSO. As outlined above, that proceeding affords plaintiff the right to challenge both the justification of PSO's taking and the adequacy of any resulting compensation. *See generally* Okla. Stat. Ann. tit 66, §§ 51-57. Thus, until that proceeding is concluded, any objections he may have cognizable under the most directly pertinent provision of the federal Constitution--the Just Compensation Clause (JCC)--are not ripe for adjudication and must be dismissed for lack of subject matter jurisdiction under *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-96 (1985). More to the point here, this ripeness rule encompasses other constitutional claims which fall squarely within the primary purview of the JCC in this context, such as the due process, equal protection, and access-to-courts infirmities plaintiff alleges with respect to the state eminent domain proceeding. *See Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996) (collecting numerous Tenth Circuit cases). Thus, pursuit of such closely-related objections must await the ripening of the predominant JCC claim. *Id.*

However, one condemnation-related claim here clearly falls outside the *Williamson* bar. In addition to the objections to his own proceeding, plaintiff appears to raise a generalized facial challenge to the state eminent domain scheme itself, for permitting any condemnor to take immediate possession upon payment of an administratively-determined compensation before final judicial resolution of the landowner's objections, *see* Okla. Stat. Ann. tit 66, § 53(C). While an objection to the taking "as applied to [plaintiff's] property would be unripe [under Williamson]," such a "facial challenge to the [statutory

scheme]" is immediately adjudicable. *See Yee v. City of Escondido*, 503 U.S. 519, 533-34 (1992).

This evidently was, in fact, the claim addressed by the district court, which held that predeprivation hearings are not constitutionally required in the eminent domain context. We agree. In addition to the authorities the district court discussed, we note the Supreme Court specifically stated in Williamson that "[u]nlike the Due Process Clause... the Just Compensation Clause has never been held to require pretaking process or compensation." *Williamson*, 473 U.S. at 195 n. 14 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984)); *see also J. B. Ranch, Inc. v. Grand County*, 958 F.2d 306, 309 & n.4 (10th Cir. 1992) (quoting *Williamson* and rejecting due process Claim based on asserted need for pretaking hearing in this context as "impos[ing] new and potentially inconsistent obligations" beyond those required by JCC), Indeed, this was a premise for the *Williamson* Court's ripeness analysis: "[B]ecause the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not 'complete' until the State fails to provide adequate compensation for the taking," *Williamson*, 473 U.S. at 195; *see also Biddison v. City of Chicago*, 921 F.2d 724, 727 n.4 (7th Cir, 1991).

This point is obscured somewhat by decisions of the Oklahoma Supreme Court which, while not holding the eminent domain scheme (particularly the immediate-possession provision of § 53(C)) invalid, have broadly stated that "the establishment of the right to condemn is a prerequisite to any right of possession by the Condemnor." *Town of Ames v. Wybrant,* 220 P.2d 693,695 (Okla. 1950) (citing *Watkins v. Board of Comm'rs*, 174 P. 523,525 (Okla. 1918)). However, a wider view of the case law harmonizes

the supreme court's language with its evident acceptance of § 53(C). Thus, the legislative authorization of immediate possession is permissible *in that* such possession *remains subject to review and potential restraint* through the courts' equitable power: "According to *Wybrant*; and *Watkins*, a public body having the power of condemnation *can be enjoined* from appropriating private property for public use until it has initiated condemnation proceedings and had its right to condemn the property finally determined." *City of Bartlesville v. Ambler*, 499 P.2d 433, 436 (Okla. 1971) (emphasis added); *See Wybrant*, 220 P.2d at 696 (noting that "*upon proper application and showing* [by the landowner]" the trial court "*could make an order temporarily restraining* the condemnor from taking possession of the land pending final determination of the right to condemn" (emphasis added)); *Wrightsman v. Southwestern Natural Gas Co.*, 46 P.2d 925,933 (Okla. 1935) (same). Indeed, plaintiff has taken the opportunity to seek equitable relief in the state proceedings; he has just not persuaded the Oklahoma courts that it is warranted in his case. Thus, the state courts' construction and assessment of the eminent domain scheme is consistent with applicable federal precedent, and neither of these bodies of authority support plaintiff's position that the Scheme is invalid.

Freedom of Speech

Plaintiff's First Amendment claim, which challenges a collateral order on a basis substantively independent of the condemnation process itself, appears also to fall outside the *Williamson* ripeness bar. *Compare Landmark Land Co. of Okla., Inc, v, Buchanan*, 874 F.2d 717, 723 (10th Cir. 1989) (holding intangible due process right that was substantively distinct from JCC protections was not subsumed under *Williamson* ripeness rule), *with J. B. Ranch. Inc.*, 958 F.2d

at 309 (holding *Williamson* applicable to due process claim that fell squarely within compass of JCC protections). However, we hold that dismissal of the claim was warranted in any event.

The target of the claim is the state trial court's order enjoining plaintiff "from directly or indirectly interfering in any manner with the construction, maintenance and operation of [PSO's] railroad spur." Appellants' Supp. App. at 21. There is nothing facially speech-sensitive about this order, nor does plaintiff cite any authority that would support such a claim. Actually, plaintiff is primarily concerned with a contempt proceeding brought to enforce the injunction after this appeal was filed. In that proceeding, which has not been concluded, PSO seeks to hold plaintiff in contempt for sending a letter to BN admonishing that, in light of the Oklahoma Supreme Court's reversal of PSO's condemnation order, plaintiff "is restoring [his] fence line around [the disputed easement] and posting 'NO TRESPASSING' signs." *Id.* at 22. Whether plaintiff has a cognizable claim under the First Amendment on this basis is not a question properly before this panel.

Trespass

The district court explained that its rejection of plaintiff's constitutional challenges to the eminent domain proceedings mooted any remaining claims and, accordingly, dismissed the entire case. As plaintiff recognizes, his claim against BN for trespass obviously stands or falls with the legitimacy of the eminent domain proceeding from which the railroad derives its status as licensee. Since any further challenges to that proceeding are not currently ripe for adjudication, the district court's dismissal of the action should be affirmed.

State Proceedings - Status Reports

Status reports submitted by plaintiff reflect some unfavorable rulings issued in the ongoing eminent domain proceedings. In particular, plaintiff complains of the Oklahoma Supreme Court's March 22, 1999 denial of his mandamus petition seeking to disqualify the state trial judge, and the May 4, 1999 denial of certiorari in his interlocutory appeal from the trial court's refusal to dissolve the order enjoining interference with PSO's operations. For the same reasons expressed above in connection with plaintiff's challenge to the eminent domain proceeding as a whole, these particular objections to specific rulings therein are not ripe for consideration. Further, if a particular ruling were somehow sufficient to give rise to a distinct, immediately actionable constitutional wrong, at this point such a claim would most appropriately be brought in district court, not interjected into this pre-existing appeal.

Conclusion

Accordingly, we affirm the district court's dismissal of this action. We clarify, however, that the disposition of plaintiff's numerous unripe claims, based on the lack of subject matter jurisdiction, is without prejudice. *See Bateman*, 89 F.3d at 706.

The judgment of the United States District Court for the Northern District of Oklahoma is AFFIRMED. All pending motions are denied as moot.

Entered for the Court

Deanell Reece Tacha
Circuit Judge

No. 06-1467

FILED
JUN 6 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

B. WILLIS, C.P.A., INC.,

Petitioner,

v.

PUBLIC SERVICE COMPANY OF OKLAHOMA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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June 6, 2007

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Are the procedural due process and preemption issues raised by Willis barred by the doctrines of res judicata and collateral estoppel?

2. Is there a procedural due process right to a predeprivation hearing in a state eminent domain case where the applicable state statute affords two opportunities for judicial review: the filing of exceptions or objections to the report of court-appointed commissioners; and the filing of a separate action for injunctive relief?

3. Does the federal preemption set forth in 49 U.S.C. § 10501(b) apply to the construction of private rail track over which the United States Surface Transportation Board has no jurisdiction under 49 U.S.C. § 10501(a)?

PARTIES TO THE PROCEEDING

There are no parties to the proceedings in this case or in the Supreme Court of Oklahoma other than those listed in the caption.

CORPORATE DISCLOSURE AND RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, the Respondent, Public Service Company of Oklahoma ("PSO"), states that it is a wholly-owned subsidiary of AEP Utilities, Inc., which is a wholly-owned subsidiary of American Electric Power Company, Inc., formerly known as American Gas and Electric Company, and that there are no other publicly held corporations that own ten percent (10%) or more of the stock of either PSO or AEP Utilities, Inc.

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JURISDICTION

This is an appeal of a decision of the Court of Civil Appeals of Oklahoma dated September 19, 2006 which became a decision of the highest court in Oklahoma when the Supreme Court of Oklahoma denied certiorari on February 5, 2007. The Petition for Writ of Certiorari was placed on the docket in this Court on May 7, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.[1]

STATEMENT OF THE CASE

A. Introduction

This case began as a routine condemnation action between an electric utility and a landowner in the state district court in Rogers County, Oklahoma in October 1992. The Respondent, Public Service Company of Oklahoma ("PSO"), sought to obtain an easement from the landowner, Petitioner B. Willis, C.P.A., Inc. ("Willis"), for a private track to facilitate deliveries of coal to its electricity generating station. When negotiations with Willis failed, PSO sought to exercise eminent domain power conferred by Oklahoma law to obtain the easement across Willis' property.

Now, more than fourteen years later, this case is before this Court for the fourth time;[2] this time seeking review of a

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[1] Willis' reference to 28 U.S.C. § 2106 (Pet., at 1) is misplaced as that section provides only appellate remedies and not an independent basis for jurisdiction.

[2] The previous appeals are: *B. Willis, C.P.A., Inc. v. Pub. Serv. Co. of Okla.*, 528 U.S. 1003 (1999) (writ of certiorari denied); *B. Willis, C.P.A., Inc. v. Goodpaster*, 528 U.S. 1046 (1999) (writ of certiorari denied); and *B. Willis, C.P.A., Inc. v. Surface Transp. Bd.*, 540 U.S. 811 (2003) (writ of certiorari

decision of the Court of Civil Appeals of Oklahoma in an interlocutory appeal affirming PSO's right to condemn. Importantly, when the state trial court held the hearing Willis claims to have been denied, Willis offered no witnesses nor evidence of any kind to show that PSO did not have the right to condemn. Instead, Willis argued only that the court's decision was incorrect and the hearing was too late.[3]

The issue of just compensation is now before the state trial court and a jury trial is currently scheduled for January 2008.

The first issue raised by Willis in this case challenges the constitutionality of Oklahoma's statutory eminent domain procedure; however, the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit"), in a related case involving these same parties and this same occurrence, has already determined that the Oklahoma procedure is constitutional. This Court later denied certiorari. Consequently, Willis is precluded from again litigating that issue. Even if Willis is not so precluded, the Constitution is satisfied by the payment of just compensation and a post-deprivation proceeding. In addition, if a pre-deprivation hearing were desired, Willis could have sought a stay, supercedeas, injunction, or other order to prevent PSO's acquisition of the easement, but did not. Willis did,

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denied).

[3] Willis again impugns the integrity of the state trial judge, who is one of the most respected members of the trial bench in Oklahoma, with the spurious allegation that *ex parte* communications were conducted concerning the merits of the case. Willis failed in efforts to remove the state trial judge and no court, state or federal, has ever found a basis for these claims. In reality, the *ex parte* conversation of which Willis complains occurred in 1994 and involved only scheduling and administrative matters which are expressly authorized in the Oklahoma Code of Judicial Conduct, Canon 3(B)(6)(a) (5 Okla.Stat., Ch. 1, App. 4).

however, file numerous state and federal court cases seeking various forms of relief, but none were successful.

The second issue raised by Willis is its assertion that the federal preemption provisions of 49 U.S.C. § 10501 preempt Oklahoma's eminent domain statutes; however, the United States Surface Transportation Board ("STB" or "Board") and the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), in a related case involving these same parties and this same occurrence, have each determined that there is no preemption applicable to this occurrence. This Court later denied certiorari. Consequently, Willis is precluded from relitigating that issue. Even if Willis were not so precluded, there is no applicable preemption.

This case presents none of the reasons justifying review usually required by this Court. *See* Sup. Ct. R. 10. It does not seek to resolve a conflict between circuits, between the highest courts of two or more states, or between the state and federal courts. The federal issues it presents have been decided by this Court and Willis has presented no compelling reason for reversal.

B. Background

The Oklahoma Constitution and statutes authorize the taking of private property for public purposes by electric utilities like PSO through the exercise of eminent domain subject to various requirements, including payment of just compensation. Okla.Const., Art. 2 § 24; 27 Okla.Stat. §7. Condemnation procedures are the same as for railroad companies. *Id.*; 66 Okla.Stat. §§ 51 - 57.

Oklahoma's condemnation procedures are well described by the Tenth Circuit in the related case of *B. Willis, C.P.A., Inc.*

v. Pub. Serv. Co. of Okla., 182 F.3d 931, 1999 WL 335207 (10th Cir.), *cert. denied* 528 U.S. 1003 (Unpublished) (Pet. App. C at 19a), as follows:

> The procedure may be outlined in pertinent part by the following steps: (1) the condemnor corporation applies to the district judge, with notice to the landowner, for selection of a three-person commission; (2) the commissioners inspect the property, assess just compensation for the injury involved, and file a report with the clerk of the court, which is promptly forwarded to interested parties; (3) if the condemnor pays the assessed sum, it may take immediate possession consistent with its proposed use, though all parties retain the right to challenge the commission's report; (4) review may be sought in the district court by filing written exceptions to the report or a demand for jury trial; (5) the district court's final judgment (approving compensation or denying condemnation) is subject to appeal, but such review shall not delay the condemnor's use of the property, if approved, so long as the assessed compensation has been paid.

Id. at *1.

Both the Oklahoma Constitution, Art. 2 § 24, and Oklahoma statutes, specifically 66 Okla.Stat. § 53(C), authorize condemnors to take possession of property without the consent of the landowner upon payment of the amount of just compensation assessed by court-appointed commissioners.

At the inception of this case, PSO followed the statutory procedures, paid the amount of the commissioners' award into court, and only then took possession of the easement and constructed its private track. During this time, Willis

threatened to interfere with construction and was enjoined by the state trial court. At no time prior to construction did Willis seek a stay, injunction, supercedeas, or other order in the state trial court to prevent possession or construction during the pendency of the appeal. Willis did, however, initiate two (2) appeals and eight (8) original actions in the appellate courts of Oklahoma as well as four (4) cases in the United States District Court for the Northern District of Oklahoma and one administrative proceeding before the STB.

In February 2001, nearly six years after PSO had completed its track across Willis' land, Willis commenced an action at the STB seeking a declaration that the construction and operation of the track was unlawful because it had not first been approved by the STB under 49 U.S.C. § 10901. That section requires rail common carriers to obtain STB authorization before constructing or operating new or extended railroad lines. The STB denied Willis' petition in a decision served October 3, 2001, concluding that its jurisdiction extends only to track used for "common carrier service," that the track over Willis' land constitutes "private track," and that:

> if a shipper does not hold out to provide common carrier railroad service over a line it constructs and maintains to serve its own facility, and no other shippers are served by the line, then neither that construction, nor a railroad's operation over that track to reach the shipper's facility, requires . . . Board authorization or approval.

B. Willis, C.P.A., Inc. Petition for Declaratory Order, Finance Docket No. 34013, 2001 WL 1168090 (STB served Oct. 3, 2001) ("*STB Declaratory Order I*"). Willis' petition for reopening and reconsideration of that ruling was denied by the STB in a further decision served July 26, 2002. *Id. on petition*

for reopening, 2002 WL 1730018 (STB served July 23, 2002) ("*STB Declaratory Order II*").

The D.C. Circuit upheld the STB's determination that PSO's track is a private track and as such is not subject to federal jurisdiction under 49 U.S.C. § 10501. *B. Willis, C.P.A., Inc. v. Surface Transp. Bd.*, 51 Fed. Appx. 321, 2002 WL 31684796 (No. 01-1441, DC Cir. Nov. 26, 2002). That court specifically noted and rejected Willis' contention that 49 U.S.C. § 10501(b)(2) created exclusive federal jurisdiction over *all* track, including track used for private rather than common carriage, stating that "[t]his interpretation is implausible on its face." *Id.* at *1. Willis' petitions for rehearing or rehearing *en banc* were denied in two *per curiam* orders. No. 01-1441, *B. Willis, C.P.A., Inc. v. Surface Transp. Bd.*, 51 Fed. Appx. 321, 2002 WL 31684796 (DC Cir. Nov. 26, 2002), *reh. denied* Jan. 10, 2003. Willis then petitioned this Court for a Writ of Certiorari, which was denied on October 6, 2003 (No. 02-1498, 540 U.S. 811 (2003)).

Willis is precluded by its prior litigation from re-trying the issues it raises here. Alternatively, all of the issues Willis now seeks to raise were correctly decided in favor of PSO and should be affirmed. Certiorari should be denied.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

I. Willis is precluded by a prior decision of the United States Court of Appeals from relitigating the alleged denial of due process.

Willis has had all of the process which is its due, it simply does not like the results. Willis now asserts that it was denied due process of law because PSO did not obtain a final,

unappealable judgment confirming its right to take Willis' property by condemnation. As will be discussed below, this Court has never held that such a judgment is a prerequisite for condemnation, but this Court need not reach that issue because Willis has already litigated the federal constitutional issue in a case involving the same parties and the same occurrence and lost. Willis is now precluded from relitigating those issues.

The state trial court initially found that PSO had the right to exercise eminent domain power and condemn an easement across Willis' property in March 1994. Willis appealed that decision on other grounds without seeking a stay, posting supercedeas, or obtaining an injunction, and, in June 1997, after PSO had built its private track, the Supreme Court of Oklahoma reversed the trial court and remanded the case for further proceedings consistent with its opinion. *See Pub. Serv. Co. of Okla. v. B. Willis, C.P.A., Inc.*, 941 P.2d 995 (Okla. 1997).

After that case was remanded, but before any further decision was reached on either PSO's right to take or Willis' right to just compensation, Willis filed two separate suits in the United States District Court for the Northern District of Oklahoma ("Northern District") alleging, *inter alia*, deprivation of its civil rights under 42 U.S.C. § 1983. Willis claimed that it was denied due process because there had been no final, unappealable decision on PSO's right to condemn prior to PSO's possession of the property. The Northern District consolidated the cases and granted summary judgment to PSO and Willis appealed.

In *B. Willis, C.P.A., Inc. v. Pub. Serv. Co. of Okla.*, 182 F.3d 931, 1999 WL 335207 (10th Cir. 1999), *cert. denied* 528 U.S. 1003 (unpublished) (Pet. App. C at 19a), the Tenth Circuit found as follows:

> Virtually all of [Willis'] complaints derive in one way or another, from the eminent domain proceeding prosecuted by PSO. As outlined above, that proceeding affords [Willis] the right to challenge both the justification of PSO's taking and the adequacy of any resulting compensation. *See generally* Okla.Stat.Ann. tit 66, §§ 51-57. Thus, until that proceeding is concluded, any objections he may have cognizable under the most directly pertinent provision of the federal Constitution – the Just Compensation Clause (JCC) – are not ripe for adjudication under *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-96 (1985).

Id. at *2 (Pet., Appendix C at 23a).

The Tenth Circuit found that Willis' due process claim was ripe, that the Oklahoma condemnation statutes are constitutional, and that Willis had received all that the Constitution requires. As the Court explained:

> [O]ne condemnation-related claim here clearly falls outside the *Williamson* bar. In addition to objections to his own proceeding, [Willis] appears to raise a generalized facial challenge to the state eminent domain scheme itself, for permitting any condemnor to take immediate possession upon payment of an administratively-determined compensation before final judicial resolution of the landowner's objections, *see* Okla.Stat.Ann. tit 66, §53(C). While an objection to the taking "as applied to [Willis'] property would be unripe [under Williamson]," such a "facial challenge to the [statutory scheme]" is immediately adjudicable. *See Yee v. City of Escondido*, 503 U.S. 519, 533-34 (1992).

Id. (Pet. App. C at 23a-24a).

Willis now seeks to relitigate the constitutionality of the Oklahoma statutory condemnation scheme in this case; however, Willis is barred by the doctrine of issue preclusion. *See generally Arizona v. California*, 530 U.S. 392, 414 (2000), quoting Restatement (Second) of Judgments § 27 (1982), p. 250 ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.").

Applying the doctrine as it relates to this case and the prior Tenth Circuit case, the issue is one of law involving the right to a predeprivation hearing in the eminent domain context in both cases, the parties are identical in both cases, and the occurrence is the same in both cases. The Tenth Circuit case was a valid and final judgment which included a determination of the constitutionality of the Oklahoma eminent domain procedure, which Willis again seeks to invalidate in this case.

The only difference between the two cases is that the Tenth Circuit case involved a civil rights claim based on the "Taking" and "Just Compensation" Clauses, and this case involves the exercise of eminent domain in keeping with the "Taking" and "Just Compensation" Clauses. As the Restatement explains, the issue is nevertheless precluded "whether on the same or a different claim." *Id.*; *see also Baker v. Gen. Motors Corp.*, 522 U.S. 222, 234 (1998) ("We see no reason why the preclusive effects of an adjudication on parties and those 'in privity' with them, . . . , should differ depending solely upon the type of relief sought in a civil action."); and *United States v. Mendoza*, 464 U.S. 154, 158 (1984), citing *Montana v. United States*, 440 U.S. 147, 153 (1979) ("Under the judicially developed doctrine

of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation.").

"As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citing *Montana v. United States*, 440 U.S. at 153-54); *see also United States v. Mendoza*, 464 U.S. at 158. These doctrines "not only reduce unnecessary litigation and foster reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen v. McCurry*, 449 U.S. at 95-96 (citing *Younger v. Harris*, 401 U.S. 37, 43-45 (1971)).

In the present case, Willis has already had its day in court on the issues of a supposed right to a predeprivation hearing and the constitutionality of the Oklahoma statutory condemnation procedure. Willis' Argument 1 is precluded.

II. Willis has received due process through the availability of predeprivation compensation and injunctive relief and post-deprivation hearing and appeal.

This issue was decided by this Court in affirming the federal district court, without opinion, in *Joiner v. City of Dallas*, 380 F.Supp. 754 (N.D.Tex. 1974), *aff'd* 419 U.S. 1042, *reh. denied* 419 U.S. 1132 (1975). In *Joiner*, a three-judge panel extensively reviewed the Texas condemnation procedure, which is similar in most respects to the Oklahoma procedure, and found it constitutional. Willis does not discuss *Joiner* nor cases which have followed it, and offers no reason for

overruling it.

The landowners in *Joiner*, like Willis (Pet. at 14-19), argued that the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires a predeprivation hearing on the right to condemn. *Id.* at 771-74. The court said:

> The gravamen of their complaint on this point is that potential condemnors may acquire the right to possession . . . prior to an adjudication of the right of condemnation, the necessity for condemnation, or the amount of compensation to be paid. We are unable to find a constitutional defect in this portion of the eminent domain framework.

Id., at 771.

The *Joiner* court, in specifically addressing the landowners' right to contest the public use and necessity for condemnation, found that the landowners' rights are adequately protected by the available procedures for excepting to the report of the court appointed commissioners and by the availability of injunctive relief. Because of its cogency, the District Court's opinion is quoted here at length as follows:

> Any owner who believes that the condemnor is without authority to initiate condemnation proceedings or that there is no public purpose for the condemnation has two avenues of judicial review. First, by including these issues in the written objections filed in response to the Report of the Special Commissioners in Condemnation, the property owner may litigate these matters in the County Court at Law with the right of appellate review of any final judgment. Pursuit of this avenue of review

> does pose the risk that the condemnor will gain the right of possession through [the statute].
>
> As an alternative, however, property owners may commence a simultaneous collateral injunctive action in district court. If the proposed appropriation is not for a public purpose or the condemnor does not have the power to condemn property, the condemnation proceedings are void, the County Court at Law is without jurisdiction, and the district court will enjoin the condemnation proceedings. *** We believe that the ability of the property owners to receive a judicial adjudication of the right to condemn private property through a collateral proceeding sufficiently protects their interest in the property sought to be condemned.

Id. at 772.

Like the applicable Texas statute in *Joiner*,[4] the Oklahoma statute at issue, 66 Okla.Stat. § 53(C),[5] together with the

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[4] Vernon's Texas Code Ann., Article 3268, repealed, *now see* Tex. Property Code, Sections 21.021, 21.044, 21.062, and 21.063. This Court's decision in *Joiner, supra*, has been applied to these new statutes as well. *See, e.g., Hope v. United States*, 23 Cl.Ct. 776, 783 (1991).

[5] In pertinent part:

> And if said corporation shall, at any time before it enters upon said real property for the purpose of constructing said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises.

Oklahoma Constitution, Art. 2, § 24,[6] authorize the condemnor (PSO) to take possession of the easement upon payment of the value of the property taken either to the landowner or to the court for the landowner.[7]

Under both the Texas scheme at issue in *Joiner* and under the Oklahoma statutory and constitutional authorities, due process is satisfied because the landowner (Willis) has two avenues for judicial review: First, by filing exceptions or objections to the report of the court appointed commissioners; and Second, by filing a separate action for injunctive relief.

The present case is the culmination of Willis' attempts to utilize the first option to defeat PSO's condemnation. Willis

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[6] In pertinent part:

> Any party aggrieved shall have the right of appeal, without bond, and trial by jury in a court of record. Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested. When possession is taken of property for any public use, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judicial determination of the sufficiency or insufficiency of such compensation.

[7] "One practical effect of this procedure is to require the land owner to initiate any hearing on the validity of the taking, but this aspect of the Texas eminent domain laws has been held to be compatible with due process." *Smart v. Tex. Power and Light Co.*, 525 F.2d 1209, 1211 (5th Cir. 1976), citing *Joiner, supra*; *see also Washington Metro. Area Transit Auth. v. One Parcel of Land*, 706 F.2d 1312, 1320 (4th Cir. 1983) (following *Joiner, supra*). Procedural due process is satisfied if the landowner is afforded an opportunity to challenge the public use aspect of the taking. *See Rhode Island Econ. Dev. Corp. v. The Parking Co.*, 892 A.2d 87, 101-02 (R.I. 2006).

filed exceptions to the report of the commissioners in 1993, which were overruled in 1994. Willis then filed an interlocutory appeal of that order, but did not seek or obtain a stay, supercedeas, or other order to prevent PSO from entering on the property and constructing its private track. *See, B. Willis, C.P.A., Inc.*, 941 P.2d 995 (Okla. 1997). Even though the Supreme Court of Oklahoma reversed the trial court's decision on the exceptions, neither that court nor the trial court found it necessary to order PSO to vacate the easement. Willis had the opportunity, throughout the state condemnation proceedings, to ask for an injunction – which would have provided the pre-deprivation hearing Willis claims was denied, but Willis chose not to do so.

PSO, on the other hand, sought and obtained an injunction to prevent Willis from interfering with PSO's rightful possession of the easement. Willis appealed that order as well. In an unpublished decision, the Court of Civil Appeals of Oklahoma found that the trial court acted properly in issuing the injunction and that, even though the trial court had been reversed, the trial court "was not required to undo all that had transpired before then." *Pub. Serv. Co. of Okla. v. B. Willis, C.P.A., Inc.*, Okla.Sup.Ct. Case No. 90,569, *cert. denied* (Resp. App. A, p. 1a ¶13). That decision was not appealed to this Court and is now the settled law of the case.

Willis could also have sought injunctive relief in a separate proceeding, but did not do so. *See Town of Ames v. Wybrant*, 220 P.2d 693, 696 (Okla. 1950) ("[W]e deem it well to say that the District Court after objection to the Commissioners' report . . . could make an order temporarily restraining the condemnor from taking possession of the land pending final determination of the right to condemn." Citation omitted); *Delfeld v. City of Tulsa*, 131 P.2d 754, 761 (Okla. 1942) (finding no prejudice in placing the burden on the landowner to seek injunctive relief

"when the sole issue was whether the use to which this land was to be put was a public use"); and *cf., Delhi Gas Pipeline Corp. v. Swanson*, 520 P.2d 670, 671-72 (Okla. 1974) (landowner filed separate action for trespass and injunction, but waived objections to the right to condemn by not raising or preserving them for appeal in the condemnation case); *Graham v. City of Tulsa*, 261 P.2d 893 (Okla. 1953), *reh. denied* (trial court's refusal to enjoin condemnor's possession of the landowner's property pending the appeal was not error); and *Wrightsman v. Sw. Natural Gas Co.*, 46 P.2d 925, 933 (Okla. 1935) (in *dicta*, the court found that a trial court could "make an order temporarily restraining a condemnor from taking possession of the land pending final determination of the right to condemn").

Willis did, however, seek extraordinary relief from the Supreme Court of Oklahoma in eight (8) separate original actions (generally seeking writs of mandamus and/or prohibition) and was unsuccessful in each.

Rather than confront the foregoing authorities, Willis argues that it has "a procedural due process right to a predeprivation hearing whenever the state deprives a citizen of property." Pet. at 15. The cases on which Willis relies do not involve eminent domain, and do not support this statement.

For example, in *Fuentes v. Shevin*, 407 U.S. 67 (1972), this Court found that the defendant in a replevin case is entitled to a predeprivation hearing. Courts have since refused to extend that decision to the eminent domain context. *See, e.g., Vazza v. Campbell,* 520 F.2d 848, 850 (1st Cir. 1975) ("Until the Supreme Court directs otherwise, we still continue to measure eminent domain proceedings against this standard [in *Joiner, supra*] rather than against the procedural requirements of such cases as Fuentes v. Shevin, . . . , which deal with fundamentally

different issues."); and *Gov't of Virgin Islands v. 19.623 Acres of Land*, 536 F.2d 566, 570 (3rd Cir. 1976) (circuit court reversed district court's reliance on Fuentes because it was bound by this Court's affirmance in *Joiner, supra*).

Under the jurisprudence of this Court, Willis received the process which is due in the state condemnation case and failed to avail itself of alternative procedures for injunctive relief.

III. The court below correctly rejected Petitioner's argument that 49 U.S.C. § 10501(b) preempted PSO's use of state eminent domain law to build its private track as an impermissible collateral attack on prior agency and federal court rulings.

In its Argument 2, Willis once again asserts that PSO's private track, which was built and is maintained by PSO, and over which PSO's own coal traffic has been transported, is subject to exclusive federal jurisdiction under 49 U.S.C. § 10501(b). Willis further argues that said exclusive jurisdiction "precludes condemnation under state eminent domain law." Pet. at 19.

Willis' jurisdictional/preemption argument is utterly without merit. As the state court below noted, the federal agency with jurisdiction over railroads – the STB – has already twice considered Willis' § 10501 argument, and twice ruled unequivocally that PSO's track is wholly outside the scope of § 10501 because it is a private track rather than a common carrier line. *STB Declaratory Order I*; *STB Declaratory Order II*. Moreover, the D. C. Circuit upheld the STB's ruling in an

unpublished *per curiam* decision,[8] and this Court denied certiorari (540 U.S. 811 (2003)). By now asking the state courts in Oklahoma to rule that their jurisdiction over PSO's 1992 eminent domain action was preempted by exclusive federal jurisdiction under § 10501, Willis is plainly engaging in an impermissible collateral attack on those rulings in order to relitigate issues already finally and competently adjudicated.[9] As the court below succinctly put it,

> Willis has had his day in court on this issue. He may not be satisfied with the result, but he is, nonetheless, bound thereby and may not relitigate the findings of the STB in the courts of Oklahoma.

Pub. Serv. Co. of Okla. v. B. Willis, C.P.A., Inc., 155 P.3d at 851, Pet. App. B at 15a.

Seeking to avoid the *res judicata* effect of the prior STB and federal court rulings, Willis now argues that the STB simply found that it lacked jurisdiction over *PSO*, and not that

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[8] No. 01-1441, *B. Willis, C.P.A., Inc. v. Surface Transp. Bd.*, 51 Fed. Appx. 321, 2002 WL 31684796 (DC Cir. Nov. 26, 2002), *reh. denied* Jan. 10, 2003.

[9] Even if Willis were free to relitigate the non-jurisdictional status of PSO's track under § 10501, and even if it were somehow able to obtain a ruling that PSO's track was subject to federal jurisdiction thereunder, *the eminent domain jurisdiction of state courts would still not be preempted.* To the contrary, because federal railroad laws do not include a grant of eminent domain authority for common carrier railroads, railroads must proceed under state eminent domain laws when needed for construction of their jurisdictional rail lines. *See, e.g., Dakota, Minn. & E. R.R. Corp. v. South Dakota*, 236 F.Supp.2d 989, 1012 (D.S.D. 2002), *aff'd in pertinent part* 362 F.3d 512 (8th Cir. 2004). In short, Willis' jurisdictional argument is not only barred by *res judicata*, and wrong on the merits as discussed in the text, it is an argument that leads nowhere.

it lacked jurisdiction over PSO's private track (a palpably false characterization of the STB's rulings as even a casual reading of them will confirm), and that in any event the preemptive reach of § 10501(b) is broader than STB jurisdiction. In fact, however, subsection (a) of § 10501 grants the STB plenary "jurisdiction over transportation by rail carrier," and subsection (b) simply complements subsection (a) by confirming that

> The *jurisdiction of the Board [STB]* over–
>
> > **(1)** *transportation by rail carriers*, and the remedies provided in this part with respect to rates, ..., routes, services, and facilities of such carriers; and
> >
> > **(2)** *the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks*, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
>
> *is exclusive*. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

(Emphasis added). In other words, the preemptive effect of subsection 10501(b) is confined to and limited by the STB jurisdiction it protects.[10] Accordingly, the STB's final

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[10] *See also Florida E. Coast Ry. Co. v. West Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001):

> The ICCTA pre-emption provision does not preclude the application of 'all other law.' .... Rather, express pre-emption

determination that PSO's track is a private track, and that as such it is not subject to the agency's jurisdiction at all, necessarily means that § 10501(b)'s preclusive effect does not attach, either.[11]

Even if Willis were entitled to relitigate the jurisdictional status of PSO's private track – and as explained above, it is not – this argument is fundamentally flawed and would necessarily have to be rejected once again.

A. The STB does not have jurisdiction over private track.

As noted above, the Board's general grant of jurisdiction is found at 49 U.S.C. § 10501(a)(1), which states that the STB has

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> applies only to state laws 'with respect to regulation of rail transportation.' 49 U.S.C. § 10501(b) (emphasis added). This necessarily means something qualitatively different from laws 'with respect to rail transportation.' See Bennett v. Spear, 520 U.S. 154, 173, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) .... In this manner, Congress narrowly tailored the ICCTA pre-emption provision to displace only 'regulation,' i.e., those state laws that may reasonably be said to have the effect of 'manag[ing]' or 'govern[ing]' rail transportation, Black's Law Dictionary 1286 (6th ed. 1990), while permitting the continued application of laws having a more remote or incidental effect on rail transportation.

[11] As the STB noted in its second decision in the Willis case, common carrier "spur, industrial, team, switching, or side tracks" are subject to STB *jurisdiction* under § 10501(a) (and hence immune from state regulation under § 10501(b)), even though the STB is precluded from regulating them under 49 U.S.C. § 10906. The STB contrasted such common carrier tracks from purely *private* tracks (like that at issue here) which are not subject to STB jurisdiction under § 10501(a) at all – and hence are likewise outside the preemptive scope of § 10501(b). *STB Declaratory Order II*, 2002 WL 1730018, at *1.

"jurisdiction over transportation by rail carrier." "Rail carrier" is in turn defined at 49 U.S.C. § 10102(5) as "a person providing common carrier railroad transportation for compensation." The phrase "common carrier" is not defined in the statute, but it has long been established that a critical determinant of whether an entity provides common carrier services is whether it holds itself out to provide service to the general public. *See, e.g., Status of Bush Universal, Inc.*, 342 I.C.C. 550, 564 (1973); *State of Vermont & Vt. Ry., Acquisition and Operation in Vt.*, 320 I.C.C. 609, 611-12 (1964); *Atchison, Topeka & Santa Fe Ry. v. Kansas City Stock Yards Co.*, 33 I.C.C. 92, 100 (1915); *Tap Line Case*, 23 I.C.C. 277, 292 (1912); and *Black's Law Dictionary* 205 (7th ed. 1999).

This "holding out" element is, therefore, a fundamental test for whether rail trackage constitutes a common carrier facility subject to the Board's jurisdiction. *See New York Cent. R.R. v. S. Ry.*, 226 F. Supp. 463 (N.D. Ill. 1964) *aff'd*, 338 F.2d 667 (7th Cir. 1964) ("*New York Central*") and *Hanson Natural Res. Co. – Non-Common Carrier Status – Petition for a Declaratory Order*, ICC Finance Docket No. 32248 (ICC Served Dec. 5, 1994) ("*Hanson*").

In *New York Central*, the plaintiff sought to enjoin the defendant railroad from operating over private mine trackage, owned by Peabody Coal Company, which connected Peabody's mine to defendant's common carrier line, without first obtaining authorization from the ICC. Plaintiff relied on *Texas & Pac. Ry. v. Gulf, Colo. & Santa Fe Ry.*, 270 U.S. 266 (1926) to support its position that defendant's operation over the track to the mine was an extension of defendant's line that required Commission authorization. The defendant railroad argued that "it operates on the Peabody track to serve only the Peabody mine, that it has no right to serve anyone else, and that it does not hold itself out by tariff or otherwise to serve the general

public over this track." *New York Central*, 266 F. Supp. at 466. The court concluded that authorization from the ICC was not needed to operate over the private track to serve the track owner:

> [A] carrier need not apply for Commission certification ... for operating over private track to serve the track owner, where the carrier does not engage in common carrier service over the track and where the carrier does not use it[s] funds to maintain the track ***
> Unless the carrier operating over private track to serve the track owner serves the public over the track or makes some investment of its resources in the track, it is difficult to understand how the carrier could, thereby, 'undertake the extension of its line of railroad, or acquire or operate any line of railroad, or extension thereof, or engage in transportation under this chapter over or by means of such additional or extended line of railroad.'

New York Central, 226 F. Supp. at 473.

Almost thirty years later, the Board relied on *New York Central* when it decided *Hanson*.[12] In *Hanson*, the ICC discussed in detail the subject of private rail track versus common carrier railroad lines, and found, in circumstances quite similar to those here (40 miles of private track over which the owner's coal was moved by a common carrier railroad from the owner's mine to a point of connection with the common carrier railroad's lines), that the involved track was private

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[12] The Board noted that "[f]ew cases have involved a private line..." and that "[t]he best case that we have found that turns upon, and explains, operations by a common carrier railroad over a "private" line is [*New York Central*]." *Hanson* at 23.

track not subject to the agency's jurisdiction.[13] In so holding, the Board stated,

> A railroad is a common carrier if it purports to hold itself out as a common carrier for hire and if there is an ostensible and actual movement of traffic for the public for hire. The principal test is whether there is a bona fide holding out with the ability to carry for hire.

Hanson at 14. *See also Northern Plains R.R. Co. – Construction and Operation Exemption – Musselshell and Yellowstone Counties, MT*, ICC Finance Docket No. 32077 (ICC served Dec. 28, 1992) (private railroad would not become a common carrier subject to the ICC's jurisdiction as long as it, or a third party under contract to it, carries only its corporate affiliate's property over its track between a coal mine and a connection with a common carrier); *Boeing Co. – Acquisition and Operation Exemption – Chehalis W. Ry. Co.*, ICC Finance Docket No. 31916 (ICC served Oct. 24, 1991) (shipper would not become a common carrier by railroad if it carried only its own property by rail between its plant and the point of connection with a common carrier's mainline).

Thus, the first step in determining whether the STB has jurisdiction over a particular line of track is to determine whether the track is held out for service as a common carrier facility. As discussed earlier, the Board has no jurisdiction over activities or operations by parties that do not hold

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[13] The Board distinguished private lines which are not subject to § 10901(a) and § 10903(a) in the first instance, from an exempt spur under § 10907(b)(1) [now § 10906]. "[I]t should be noted ... that a private line, although it may be called a spur is not a section 10907(b)(1) [now § 10906] spur, because it is not, in the first place, a section 10901(a) railroad line." *Hanson* at 21 n.12.

themselves out to provide transportation service to the public. Neither the general licensing provision of 49 U.S.C. § 10901 (for the construction and operation of rail lines) nor the exception to that licensing requirement contained in 49 U.S.C. § 10906 (for auxiliary track) can have any application to tracks and operations that do not involve common carriage.

The facts in this case are clear and were recited by the STB in its October 3, 2001 served decision in this matter:

> PSO submitted a verified statement stating that it had paid all of the construction cost of the track and owns it. It also asserts that it has not been, and has no intention of becoming, a common carrier, and it has not held out to, or granted BNSF rights to, provide service over the line to any other shipper. V.S. Cox at 4-5. Moreover, under the *New York Central* analysis, PSO states that BNSF does not own the line in fee or through an easement, does not spend its funds to maintain the line, and serves only PSO, which is the only shipper able to receive shipments on the line.

STB Declaratory Order I, 2001 WL 1168090, at *2. Based on these facts, the STB was correct in concluding that neither the construction of this private trackage, nor BNSF Railway Company's ("BNSF") operation over the private trackage to serve PSO's electric generating station, was subject to the Board's jurisdiction.

Willis simply ignores the above "holding out" element which is a fundamental test for whether rail trackage constitutes a common carrier facility subject to the Board's jurisdiction. Willis also takes out of context and misrepresents the prior STB decision by quoting only a portion of the STB's decision of October 3, 2001 to the effect that "private tracks constitute

a narrow limited category of *rail operations*." Pet. at 20. The STB's actual decision clarified that such private tracks represent "a category of rail operations that *falls outside the Board's statutory jurisdiction*" and that "as long as rail track is constructed and operated in a manner that does not constitute common carriage, rail track can be built and operated in private status *not subject to the Board's jurisdiction.*" *STB Declaratory Order I*, 2001 WL 1168090, at *2 (emphasis added).

Additionally, Willis grossly misstates the facts when it asserts without any support that the track at issue is "controlled" by BNSF (Pet. at 21) and that "possession and control of the track in question was turned over to BNSF in March of 1995" (*id.* at 24). Here, PSO chose to build and maintain a private track, at its own expense, to serve only its own traffic. PSO has never offered to make service available over the track to any other shipper. BNSF has no ownership interest in the line. It does not pay to operate over the line. It does not pay to maintain the line. BNSF does not control the line. The operations that BNSF conducts over the track are solely on PSO's behalf, and, in fact, BNSF has no right to offer to provide service to any other shipper. *See STB Declaratory Order II,* 2002 WL 1730018, at *1.

B. The preemption provision of ICCTA did not extend the STB's jurisdiction to private lines.

Willis relies upon 49 U.S.C. § 10501(b), and cases interpreting and applying it, to argue that the STB has had exclusive jurisdiction over construction and operation of all rail trackage, including private track, since enactment of the ICC Termination Act of 1995 (Pub. L. No. 104-88, 109 Stat. 803) ("ICCTA"). Pet. at 19-25. Willis fails to reconcile, however, the preemptive effect of 49 U.S.C. § 10501(b) with the general

grant of jurisdiction contained in § 10501(a). Preemption only comes into play when some area of federal law expressly or implicitly regulates the field. Willis's reliance on preemption cases is thus misplaced. The question at hand is whether the STB has jurisdiction over private track, not whether federal law preempts state law. The STB's jurisdiction is set forth in 49 U.S.C. § 10501(a), not § 10501(b).

Willis completely ignores legislative history in relying upon the ICCTA in support of its claims that the Board has jurisdiction over the construction of rail trackage such as PSO's. The accompanying Report of the Committee of Conference on the ICCTA confirms that while residual State regulatory authority was being eliminated, it was only that which previously had co-existed with (and was subject to) the ICC's power:

> Also integrated into the statement of general jurisdiction is the delineation of the exclusivity of Federal remedies *with respect to the regulation of rail transportation.* Former section 10103 dealt with remedies in all modes of transportation regulated by the ICC, but since 1980, former section 10501(d) and 11501(d), with respect to rail transportation, had already replaced the former standard of cumulative remedies with an exclusive Federal standard, in order to assure uniform administration of the regulatory standards of the Staggers Act. *The Conference provision retains this general rule, while clarifying that the exclusivity is limited to remedies with respect to rail regulation – not State and Federal law generally.* For example, criminal statutes governing antitrust matters not preempted by this Act, and laws defining such criminal offenses as bribery and extortion, remain fully applicable unless specifically displaced, *because they*

> *do not generally collide with the scheme of economic regulation (and deregulation) of rail transportation.*

H.R. Rep. No. 104-422, 104th Cong. 1st Sess. at 167 (1995) (emphasis supplied). The same rationale applies equally to non-criminal statutes and regulations that "do not generally collide" with the STB's economic regulatory authority.

Willis cites *CSX Transp., Inc., v. Georgia Pub. Serv. Comm'n*, 944 F. Supp. 1573 (N.D. Ga. 1996), for its sweeping preemption assertions; however, in that case, plaintiff CSX Transportation was indisputably a common carrier and thus subject to the jurisdiction of the STB under 49 U.S.C. § 10501(a). The question for the court was whether state regulation of a particular area of CSX's activities, such as a customer service center, was allowed or whether § 10501(b) preempted state regulation. The situation is very different here. PSO is not a rail carrier under § 10501(a), and more importantly *the track at issue is not a common carrier facility*, and thus the jurisdiction of the Board does not attach. Without jurisdiction in the first instance, the analysis should never reach subsection (b) preemption issues.

Willis also cites four STB and federal district court decisions for the proposition that "states are . . . precluded from exercising jurisdiction in the face of federal preemption." Pet. at 21-22. These cases are inapposite. One of these cited cases involved state/local control over common carrier railroad operations through local permitting requirements that could be used to deny a common carrier railroad the ability to conduct some part of its common carrier transportation operations, or to proceed with activities that already have been authorized by the STB. *See Cities of Auburn and Kent, WA – Petition for Declaratory Order – Burlington N. R.R. Co. – Stampede Pass*

Line, 2 S.T.B. 330 (1997) ("*Stampede Pass Line*").[14] The other three cases cited by Willis, *Fletcher Granite Co., LLC – Petition for Declaratory Order*, STB Finance Docket No. 34020 (STB served June 29, 2001), *Flynn v. Burlington N. Santa Fe Corp.*, 98 F.Supp.2d 1186 (E.D. Wash. 2000), and *Wis. Cent. Ltd. v. City of Marshfield*, 160 F.Supp.2d 1009, 1013 (W.D. Wis. 2000) ("*Marshfield*"),[15] all involved State or local actions that purported to control matters similarly regulated by the STB or that might interfere with a carrier's interstate rail operations or otherwise involved activities that were integrally related to the railroad's ability to provide interstate common carrier rail service.

These decisions merely stand for the proposition that where a State or local regulation purports to impose a separate approval or "pre-clearance" condition on a railroad activity specifically subject to approval by the STB under Title 49, or attempts to regulate or unreasonably interfere with common carrier railroad service deemed by statute to be within the STB's exclusive regulatory jurisdiction, the conflict will be

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[14] This decision is consistent with the decisions of the STB and the courts that 49 U.S.C. § 10501(b) preempts State and local efforts to thwart STB-approved construction and operation of common carrier rail lines, based on local environmental and safety concerns. *See, e.g., Dakota, Minn. and E. R.R. Corp. v. South Dakota*, 236 F.Supp.2d at 1006 (holding that a South Dakota eminent domain statute imposing new requirements that a railroad must meet before it may exercise eminent domain power was pre-empted as "pos[ing] an insurmountable barrier" to the STB-approved rail construction project in question).

[15] Willis argues that since Marshfield was not a common carrier, but federal preemption was found to apply, it supports application of preemption in this matter even though PSO is not a common carrier. Pet. at 24. The critical distinction, of course, is that the track in *Marshfield* was a common carrier rail line (owned by the Wisconsin Central), while here, the track is private line (owned by PSO).

resolved by preemption of the State or local action. As explained in these decisions, the preemptive effect of the ICCTA is circumstance-specific, not transcendent as contended by Willis, and a traditional fact-specific preemption balancing test will need to be performed in many cases. *See, e.g., Stampede Pass Line*, 2 S.T.B. at 338. Additionally, Willis completely fails to show how the PSO condemnation action, which was undertaken as a means of obtaining direct service from BNSF as a competitive alternative, would in any way regulate or unreasonably interfere with interstate transportation. Of course, the PSO state court condemnation action did not involve any attempt to require "pre-clearance" of railroad activities subject to the STB's exclusive jurisdiction or otherwise regulate or unreasonably impede or interfere with common carrier operations subject to the jurisdiction of the STB.

Willis further references ICC case authority to the effect that prior regulatory approval must be obtained under 49 U.S.C. § 10901 for condemnation of a common carrier "railroad line." Pet. at 23-24. Again, Willis misses the boat with this line of argument. As the foregoing discussion makes clear, and as the STB and D.C. Circuit held, PSO's private track is not a "railroad line" subject to STB jurisdiction and therefore its condemnation did not require prior STB approval.

While the ICCTA updated the language of 49 U.S.C. § 10901(a) in several respects, it did not alter its pre-existing limitation to the construction, acquisition, or operation of a common carrier "railroad line." Moreover, the legislative history of the ICCTA in the Conference Report explicitly confirms that Congress intended § 10901 to remain inapplicable to construction of tracks by non-railroads to serve their own facilities:

> [T]he Conference intends no change in existing law with respect to the coverage of regulatory authority over construction of rail lines. Specifically, non-railroad companies who construct rail lines to serve their own facilities, whether or not such lines would be classified as a spur or other auxiliary track exempt from agency jurisdiction, are not required to obtain agency approval to engage in such construction.

H.R. Rep. No. 104-422, 104th Cong. 1st Sess. at 179 (1995). Congress has made clear that, in relation to rail transportation, jurisdiction is vested in the STB only when a common carrier is involved (49 U.S.C. § 10501(a)). A common carrier must obtain a license to construct new track (49 U.S.C. § 10901) unless that track falls under an exception (49 U.S.C. § 10906) in which case, as noted earlier, the Board has jurisdiction, but no license is required. In these situations the Board's jurisdiction is complete and preempts state regulation. When the owner of the track is not a common carrier but instead a non-railroad, and where the track is not to be held out for use in providing common carrier service to the public, the Board does not have jurisdiction and therefore no license is required. PSO falls into this latter category and, therefore, was not required to obtain a license from the Board.[16]

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[16] For the reasons explained above in this Section III, the STB does not have jurisdiction over private tracks, the ICCTA did not extend the STB's jurisdiction to private tracks, and Willis is bound by the earlier STB and court decisions on these issues. Although it is thus unnecessary to consider the point, even if the ICCTA had extended the STB's jurisdiction to private track, the ICCTA was enacted after PSO obtained possession and commenced construction and it would not be appropriate to apply it retroactively.

CONCLUSION

The Petitioner, B. Willis, C.P.A., Inc., has had its day in Court on PSO's right to exercise eminent domain power and on the issue of federal preemption. A jury trial is now scheduled on just compensation issues in January 2008.

Meanwhile, Willis has filed eight (8) original actions and two (2) appeals in the appellate courts of Oklahoma and four (4) cases in federal court. Willis has also raised the issue of federal preemption before the STB, has appealed those rulings, and has lost each time.

All of these rulings are now final and should not be reopened in this case. It is time for this vexatious and wasteful litigation to end. The Petition for Certiorari should be denied.

Respectfully submitted,

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June 6, 2007

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APPENDIX A

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION I

No. 90,569

[Filed February 8, 1999]

PUBLIC SERVICE COMPANY OF OKLAHOMA,)
)
Plaintiff/Appellee,)
vs.)
)
B. WILLIS, C.P.A., INC.,)
)
Defendant/Appellant.)

APPEAL FROM THE DISTRICT COURT OF ROGERS COUNTY, OKLAHOMA

HONORABLE JAMES GOODPASTER, DISTRICT JUDGE

AFFIRMED

William T. Dickson,
Tulsa, Oklahoma, For Defendant/Appellant,

Stratton Taylor,
Claremore, Oklahoma,
Richard P. Hix,
Jon E. Brightmire,
Tulsa, Oklahoma, For Plaintiff/Appellee

OPINION

Carl B. Jones, Chief Judge:

¶1 Appellee Public Service Company of Oklahoma [PSO] commenced this condemnation action in 1992 to acquire part of a tract of land owned by Appellant accountancy corporation [Owner] for construction of a rail spur to move coal to one of PSO's power plants in Oologah. Appellant questioned whether the taking was truly for a public use, and filed exceptions to the report of the appointed commissioners. The trial court summarily denied the exceptions. Owner appealed.

¶2 In March 1995, construction of the rail spur was completed, and PSO's contract rail carrier began operating on the line. In late March, another division of this Court issued an opinion holding that Owner should have been allowed to conduct discovery and to have an evidentiary hearing on the issue whether the rail spur was devoted to a public use. Owner's attorney then wrote to both PSO and the railroad demanding they cease operations on the spur and stating that Owner planned to rebuild the fences and "restore the property to its original use." In response, PSO filed a "Petition for Permanent Injunction, Temporary Injunction and Temporary Restraining order Against [Owner]" in April, 1995, under the same case number as its eminent domain action. The new petition alleged, *inter alia*, that "since the time of the [Court of Appeals] ruling, [Owner] corporately and by and through its counsel has notified [PSO] to cease all use of the railroad

spur..." The trial court issued the requested temporary injunction. Owner did not appeal.

¶3 In June, 1997, the Oklahoma Supreme Court issued an opinion on certiorari to review this court's 1995 opinion. The Supreme Court held that Owner was entitled to discovery and a meaningful opportunity for hearing before PSO could condemn and occupy the property, and that both the trial court and this court were wrong to say that the allegation of necessity in PSO's petition was sufficient to shift the burden of persuasion to Owner on the matter of necessity for public use.[1] In September, 1997, Owner filed a motion to vacate the temporary injunction combined with a motion to dismiss the petition for injunctive relief and damages PSO had filed in 1995, and again wrote to PSO and the railroad threatening to rebuild the fence lines around the property and to post "no trespassing signs." The trial court denied both of Owner's motions, and granted it 45 days to conduct discovery in aid of the objections to the commissioners' report. The injunction previously issued was left in place pending the outcome of a hearing on Owner's objections.[2] From that order, Owner has brought the present appeal.

¶4 Owner's motion to vacate and to dismiss was filed over two years after entry of the injunction. Unless the order was void, Owner was limited to arguing that the order was entered because of "mistake, neglect or omission of the clerk," "irregularity in obtaining [the] order," or death of one the

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[1] / ***Public Serv. Co. v. Willis,*** 1997 OK 78, 941 P.2D 995. PSO had presented no evidence to establish necessity except to attach a copy of its board's resolution of necessity to a brief.

[2] / The trial court also denied Owner's application for injunction barring further operations on the rail line until the questions of public use and necessity were resolved.

parties before judgment. 12 O.S. 1991 §§ 1031 (Third), (Sixth); 12 O.S.Supp. 1993 § 1038. A void judgment, decree, or order may be vacated at any time on the motion of a party. 12 O.S. Supp. 1993 § 1038; see ***Stork v. Stork***, 1995 OK 61, ¶ 12, 898 P.2d 732, 738.

¶5 The trial court's decision whether or not to dissolve an injunction has been described as "to a certain extent, within the discretion of the court." ***Bourland v. Langford***, 36 Okla. 278, 128 P. 240, 240 (1912); see ***Cloer v. Gillespie***, 1963 OK 195, ¶ 12, 386 P.2d 1015, 1017. We infer from that statement that the propriety of the trial court's decision is partly a matter of law and partly a matter of fact. Absent a palpable abuse of discretion or clear showing of error, we must affirm the trial court's ruling to grant or undo injunctive relief. ***Cloer***, 1963 OK 195 at ¶ 12, 386 P.2d at 1018.

¶6 Owner contends that PSO'S 1995 petition seeking injunctive relief and damages should have been filed as a separate action. For that, he relies upon a distinction between "actions" and "special proceedings." In the oft-cited case ***Oklahoma City v. Wells***, 185 Okla. 369, 91 P.2d 1077, 123 A.L.R. 662 (1939), the court distinguished them: "Condemnation proceedings do not involve a tort. Strictly speaking they are not civil actions or suits. They are neither actions at law nor suits in equity. They are not proceedings according to the course at common law, but are special proceedings." *Id*, 91 P.2d at 1081. As a corollary, the courts have said that questions unrelated to public use and necessity of the taking or the value of the condemned property are beyond the jurisdictional power of the trial court in a condemnation case. *See* ***Burke v. Oklahoma City***, 1960 OK 29, ¶ 24, 350 P.2d 264, 269-70. In ***Burke***, the court said:

> "Our statutes prescribe the procedure for taking property by eminent domain, but do not provide that

> matters not germane to the issues involved may be litigated in the same action. The proceedings by the City are to condemn two tracts of land owned by the defendants ... [D]efendants are not entitled to litigate in this action alleged damages for [*sic*] property which was the subject matter of a previous condemnation proceeding which is not either directly or indirectly involved in the instant case and which the defendants have no interest in. If defendants are entitled to seek damages by virtue of the previous proceedings, their claim can only be litigated in a separate action."

Cf., ***Bowling v. State ex rel. BD. of County Comm'rs***, 1967 OK 121, ¶ 25, 428 P.2d 331, 337 (quoting ***Burke***).

¶7 The distinction discussed in ***Wells*** and numerous other cases was embodied in statutory law until 1984. Judicial remedies were divided into "actions" and "special proceedings." An "action" was defined as "an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense," while "special proceeding" was used to describe all other remedies. 12 O.S. 1971 §§ 3-5 (*repealed*). In 1984, those sections were repealed by enactment of the Oklahoma Pleading Code, 12 O.S. Supp. 1984 §§ 2001 *et seq.*[3] Repeal did not, however, discard the distinction at law between actions and special proceedings.[4] Condemnation is still referred to as

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[3] / *See* Okla.Sess.Laws 1984, ch. 164 § 32.

[4] /Examples of other special proceedings are probate, ***Ray v. American Nat. Bank & Trust Co.***, 1997 OK CIV APP 66, 948 P.2d 1235, *cert denied*; judicial review of administrative orders, ***Pruitt v. State ex rel. Okla. Empl. Sec. Comm'n.***, 1996 OK CIV APP 33, 918 P.2d 80; an ouster petition following grand jury accusation, ***McCormack v. Town of Granite***, 1995 OK 105, 913 P.2d 278; insurance company receivership, ***State ex rel. Hunt v.***

a special proceeding strictly controlled by the constitution and governing statutes. ***Carter v. City of Oklahoma Cit6y***, 1993 OK 134, ¶ 12, 862 P.2d 77, 80.

¶8 There are three necessary elements of jurisdiction: jurisdiction of the subject matter; jurisdiction over the person; and jurisdictional power to render the particular judgment or decision in question. ***Reed v. Scott***, 1991 OK 113, ¶ 4, 820 P.2d 445, 447. Absence of any one of these elements, if apparent on the face of the judgment roll, renders the trial court's decision void, and therefore subject to vacation at any time. 12 O.S.Supp. 1993 § 1038; ***Stork v. Stork***, 1995 OK 61, ¶ 12 and n. 17, 898 P.2d 732, 738; ***Graff v. Kelly***, 1991 OK 71, ¶ 7, 814 P.2d 489, 492.

¶9 Owner invokes the special nature of condemnation proceedings to argue that the trial court lacked jurisdictional power to render injunctive relief in the condemnation case. Because the pleadings allowed in a condemnation action are limited to the petition, demand for jury trial, and objection to the commissioner's report, *see, e.g.*, ***Western Farmers Elec. Coop v. Willard***, 1986 OK CIV APP 5. ¶ 15, 726 P.2d 361, 364, *cert. denied*, Owner contends that a petition seeking injunctive relief in the same case was improper. On occasion, courts have stated that it is discretionary whether to permit additional pleadings in a condemnation case. *See* ***Incorporated Town of Pittsburg v. Cochrane***, 200 Okla. 497, 197 P.2d 287, 292 (1948); ***Rummage v. State ex rel. Dept. of Transp.***, 1993 OK CIV APP 39, ¶ 18, 849 P.2d 1109, 1112. Clearly, though, the additional pleadings cannot raise the core issued inherent in a condemnation case; nor can they require the trial court to decide extraneous issues. *See* ***Board of Comm'rs of Creek***

Green, 1973 OK 29, 508 P.2d 639; and proceedings to declare children delinquent, deprived, or neglected, ***Stratton v. Steele***, 1974 OK 10, 519 P.2d 468.

County v. Casteel, 1974 OK 31, ¶ 16, 522 P.2d 608, 610-11 (disapproving procedure of accepting answers to petition or to report objections; an answer "will not, in and of itself, raise any issue that can be determined in the proceeding ... [and] is insufficient to bring to issue the question of amount of damages or the necessity of the taking.").

¶10 In a related argument, Owner contends that, because PSO's second petition was filed during the pendency of Owner's first appeal, the trial court lacked jurisdiction to render the order, and the order consequently is void. For that, he quotes from ***Dooley v. Foreman***, 94 Okla. 163, 221 P. 47 (1923), which in turn cited ***Egbert v. St. Louis & S. F. R. Co.***, 50 Okla. 623, 151 P.228 (1915). The court in ***Egbert*** stated the rule:

> It is a general proposition of law that no two courts have jurisdiction of the same cause of action at the same time, and, when a court has once had jurisdiction and lost it by appeal to another court, its authority to deal with the cause is suspended until jurisdiction becomes re-established. ... And if the trial court makes an order in the cause pending appeal which materially affects the rights of the parties it is null and void.

Id., 151 P. At 229 [citations omitted]. However, the rule is qualified: "[A]n appeal which is taken removes from the jurisdiction of the lower court only the matter involved in the judgment or order from which the appeal is taken. Other independent matters and collateral proceedings are not covered by the appeal, and the lower court remains its jurisdiction over them." ***Herbert v. Wagg***, 27 Okla. 674, 117 P.209, 211 (1911).

¶11 PSO contends that at the time of its second petition, it had a legal right to be on the property, following its tender into

court of the amount of damages reported by the commissioners, and that the trial court's order granting injunctive relief against Owner was a proper act related to enforcement of PSO's and/or its agent railroad to enter upon the property, construct and operate the spur line. PSO cites the case of ***Young v. Seaway Pipeline, Inc.***, 1977 OK 248, 576 P.2d 1144. In that case, while the trial court was considering the landowner's exceptions to the commissioner's report, the armed landowner threw the condemnor's workman and its counsel off the property. The trial court, at the condemnor's request, issued a temporary restraining order. The appellate court said, "Under the circumstances presented we cannot say that the trial court's decision to grant the temporary restraining order during the interim while the application for injunctive relief was being considered was anything but amply justified." *Id.*, 1977 OK 248 at ¶ 15, 576 P.2d at 1148.

¶12 ***Young*** involved no demonstrable jurisdictional challenge to the proper scope of orders which may be entered in the course of a condemnation case, and plainly did not involve any matter of jurisdictional power during the pendency of an appeal. Even so, when it is read in the context of ***Wagg***,[5] **Young** suggests that granting injunctive relief in aid of a party properly upon the condemned premises, to bar interference with its operations there, is not totally unrelated to the issues before the court in a condemnation case.

¶13 We hold that the trial court's order for relief to prevent Owner from rebuilding his fence lines across the condemned property and to forestall interference by Owner with operation

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[5] /PSO contends that ***Wagg*** was the source for Sup.Ct.R. 1.37(a)(7), 12 O.S.Supp. 1997, ch. 15, App., which states that after filing of a petition in error the trial court retains jurisdiction to "take action with respect to any issue collateral to a pending appeal." We merely note the similarity of the principal stated in ***Wagg*** and the appellate rule.

of the rail spur was a proper exercise of the trial court's jurisdiction. The court did not, as Owner attempts to characterize it, purport "to adjudicate PSO's right to appropriate [Owner's] property." After issuance of mandate in the prior appeal, the trial court was required to give Owner an meaningful, evidentiary hearing on the issues of necessity and public use, applying the appropriate burden-shifting rules. It was not required to undo *all* that had transpired before then. We therefore reject Owner's contention that the trial court lacked jurisdictional power to enter the order granting PSO's requires for injunctive relief.

¶14 Owner's other arguments are colored by his contention that the Supreme Court's opinion on his first appeal constituted "settled law of the case," which necessarily required dismissal of PSO's claim for injunctive relief made in its second petition. We do not agree. "Settled law of the case" is the doctrine of appeallate practice barring relitigation of issues which were finally settled by a previous appellate opinion or which were not timely raised during prior appellate proceedings. ***Barnett v. Barnett***, 1996 OK 60, ¶ 13 n. 13, 917 P.2d 473, 477; ***Jackson v. Jones***, 1995 OK 131, ¶ 12, n. 37, 907 P.2d 1067, 1074. The first appeal resolved only Owner's right to an evidentiary hearing, and the question whether PSO established a prima facie case of necessity by alleging necessity in its original petition. Neither of those issues finally determined the propriety of the trial court's subsequent entry of an order granting injunctive relief, and the question could not even have been timely raised during the pendency of the first appeal, because it was not at issue when the first appeal was commenced.

¶ 15 For the reasons expressed in this opinion, we hold that the trial court did not exceed its jurisdiction by entering the order for injunction, and did not err by denying Owner's

motion to vacate. The order is affirmed.

¶ 16 AFFIRMED.

HANSEN, P.J. and ADAMS, J., concur.

FILED
JUN 14 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S

No. 06-1467

In the Supreme Court of the United States

B. WILLIS, C.P.A., INC.,
Petitioner,

v.

PUBLIC SERVICE COMPANY OF OKLAHOMA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

PETITIONER'S REPLY BRIEF

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June 14, 2007

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INTRODUCTION

Respondent's Brief in Opposition is replete with misstatements of Petitioner's theory of the case, the prior holdings in other cases and the facts in the case at bar. Respondent is essential using a "straw man" argument of making a false assertion and then knocking down the "straw man" or bogus assertion Respondent falsely attributed to Petitioner.

Specifically, Respondent, Public Service Company of Oklahoma ("PSO") asserts:

1.) There is no conflict between the Circuits or state and federal courts on the issues Petitioner, B. Willis, C.P.A., Inc. ("Willis") presents in the case at bar. (Page 3.)

2.) The Surface Transportation Board ("STB") and D.C. Circuit determined that there was no preemption applicable to the track across the Willis' property. (Pages 3, 16.)

3.) The STB and D.C. Circuit determined that there was no federal jurisdiction over the track across Willis's property. (Pages 6, 16.)

4.) The case at bar is controlled by *Joiner v. City of Dallas*, 380 F. Supp. 754 (N.D. Tex. 1974) *aff'd* 419 U.S. 1042 (1974) and Willis is seeking to have this case overturned. (Pages 10, 11.)

5.) Willis argues that the STB found that it lacked jurisdiction over PSO only and not the track across Willis' property. (Pages 17, 18.)

6.) Under Oklahoma law Willis had two (2) avenues to obtain judicial review of PSO's right to condemn Willis' property but failed to seek an injunction.

ARGUMENT 1

THERE IS A CONFLICT BETWEEN THE CIRCUITS ON THE ISSUE OF A RIGHT TO A PREDEPRIVATION HEARING WHEN PROPERTY IS BEING CONDEMNED.

Respondent asserts on page 3 of its brief in opposition that this case does not seek to resolve a conflict between circuits and then cites cases from the 1st Circuit, *Vazza v. Campbell*, 520 F. 2d 848 (1st Cir. 1975), the 3d Circuit, *Gov't of Virgin Islands v. 19.623 Acres of Land*, 536 F. 2d 566 (3d Cir. 1976) as well as the 10th Circuit, *B. Willis, C.P.A., Inc. v. Pub. Ser. Co. of Okla.*, 182 F.3d 931. 1999 WL 335207 (10th Cir. 1999), cert. denied 528 U.S. 1003 (unpublished), that PSO asserts support the rule that there is no due process right to a predeprivation hearing when property is being condemned. However, as Willis pointed out in its petition, the 8th Circuit in *Hroch v. City of Omaha*, 4 F. 3d 693 (8th Cir. 1993) stated:

> Here the State could and in fact did afford Hroch a predeprivation remedy designed to protect his interest as the owner of the property sought to be condemned...After *Zinermon v Burch* *** we think it clear that the constitutional adequacy of this predeprivation remedy may be challenged under § 1983, regardless of whether a post deprivation remedy is also available. *Hroch* at 695

Thus, according to PSO, there is a conflict between the 8th Circuit and the 1st, 3d and 10th Circuits.

ARGUMENT 2

THERE IS A CONFLICT BETWEEN STATE AND FEDERAL COURTS.

Respondent asserts on page 3 of its brief that this case does not seek to resolve a conflict between state and federal courts. In fact, there is a conflict between state courts and federal courts and the STB on the scope of the federal preemption enacted with the ICC Termination Act of 1995 codified at 49 U.S.C. § 10501 (b).

State courts have interpreted the preemption in the narrowest possible manner, asserting that it was limited to economic regulation only. "...Congress' primary intent was to pre-empt economic regulation of railroads." *Oklahoma Corporation Commission v. Burlington Northern and Santa Fe Railway Company*, 24 P. 3d 368 (Ok Civ App 2001) at ¶ 12 (Emphasis in original.) See also *Union Pacific Railroad Company v. State of Oklahoma*, 990 P. 2d 328 (Ok. Civ. App. 1999).

However, federal courts have taken a much different approach. "In fact, there was nothing in the case law that supported Auburn's argument that, through the ICCTA, Congress intended preemption of only economic regulation of the railroads." *City of Auburn v. U.S. Government*, 154 F. 3d 1025, 1030 (9th Cir. 1998). "The Act reserved no area of regulation for the individual states-agency regulation or otherwise." *BNSF v. Andersen*, 959 F. Supp. 1288, 1295 (Dist. Mont. 1997). In *Fletcher Granite Company, LLC-Petition for Declaratory Order*, STB Finance Docket No. 34020 (served June 29, 2001) the STB noted in footnote 5:

> The argument that the statutory preemption in section 10501 (b) is limited to state and local "economic" regulations was rejected by the court as contrary to the

statutory text and unworkable in practice. City of Auburn, 154 F.3d at 1029-31.

Clearly, there is conflict between state and federal courts on the scope of the federal preemption found at 49 U.S.C. § 10501 (b).

ARGUMENT 3

JOINER V. CITY OF DALLAS DOES NOT CONTROL THIS CASE AND WILLIS DOES NOT ASK THE COURT TO OVERTURN IT.

Respondent asserts that the case at bar is controlled by *Joiner v. City of Dallas*, 380 F. Supp. 754 (N.D. Tex. 1974) *aff'd* 419 U.S. 1042 (1974) and Willis is seeking to have this case overturned. In fact, *Joiner* has little if any relevance to the case at bar.

Joiner concerned a challenge to the constitutionality of Texas eminent domain procedures, alleging a due process right to a predeprivation hearing on necessity and the extent of taking. This claim was denied on the grounds that these were legislative issues.

With respect to the judicial issue of public use, the Court found the Texas scheme constitutional because a predeprivation hearing was available. "Condemnation, however, is for the general public- a criteria easily tested in the District Court **before a loss of possession**..." *Joiner* at 774. (Emphasis added.)

Joiner fails to support Respondent for two (2) reasons. The issue in *Joiner* was whether is was constitutional to require the landowner, in order to obtain a predeprivation hearing on public use, to file a second lawsuit in the state district court after the condemnation action was filed in the

county court. Oklahoma only has state district courts where all proceedings are conducted. Prior to the decision Willis is appealing, to obtain a predeprivation hearing on public use, in Oklahoma the landowner merely had to file exceptions to the report of commissioners challenging the right to take the property. *Public Service Company v. B. Willis, C.P.A., Inc.*, 941 P. 2d 995. (Okla. 1997) at ¶ 17; *Wrightsman v. Southwestern Natural Gas Co.*, 46 P.2d 925 (Okla. 1935); *Town of Ames v. Wybrandt*, 220 P. 2d 693 (Okla. 1950).

However, the decision in the case at bar overturns the law that had existed in Oklahoma at least since 1935[1] and Oklahoma law now deems the property subject to the condemnation proceeding to be taken and permits the condemnor to seize possession, as soon as the commissioners' award is paid into court. In the case at bar, this occurred two (2) days before Willis was even notified that Willis now had standing for the first time to file anything with the court. *Board of County Commissioners of Creek County v. Casteel*, 522 P.2d 608 (Okla. 1974). Under Oklahoma law as it now stands, there was and is no procedure for Willis to obtain a predeprivation hearing on public use.[2]

Joiner is also largely irrelevant because the District Court limited its holdings to condemnation by governmental entities, noting that, "We do not have an allegation that the power of

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[1] Compare the decision under appeal found at page 3a of the petition with the 1997 decision in the same case found at 941 P.2d 995.

[2] Respondent persist in asserting that Willis could and should have challenged the right to take its property in an injunction proceeding. However in *Wrightsman v. Southwestern Natural Gas Co.*, 46 P.2d 925 (Okla. 1935) the Oklahoma Supreme Court rejected this concept. None the less, as set out at page 9 of the petition, as soon as Respondent seized Willis' property, Willis sought to enjoin Respondent but the application was denied.

eminent domain has been delegated to a private corporation...." *Joiner* at 744 N. 20. In the case at bar, the condemnor is a private, profit making company that engaged in a massive, criminal conspiracy involving mail fraud and subversion of the judicial process[3] to obtain the property of numerous citizens in Rogers County, Oklahoma so that it could reap millions of dollars annually.

Joiner has little relevance to the case at bar and the issues raised herein would not require that *Joiner* be overturned.

ARGUMENT 4

THE FEDERAL PREEMPTION SET FORTH IN 49 U.S.C. § 10501 (b) PRECLUDES CONDEMNATION UNDER STATE EMINENT DOMAIN LAW OF EITHER RAW LAND FOR A RAILROAD RIGHT OF WAY OR AN EXISTIN G RAILROAD TRACK AND BRIDGE.

Respondent falsely asserts that the STB and the D.C. Circuit found that there was no **federal** jurisdiction over the track across Willis' property, that Willis is claiming that the STB only found that it lacked jurisdiction over PSO and not over the track itself and also falsely asserts that both the STB and the D.C. Circuit found that there was no federal preemption under U.S.C. § 10501 (b) applicable to this occurrence or track.

What the STB and D.C. Circuit held, as Respondent's brief states at page 23, was:

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[3] The lawsuit concerning these matters is presently before the 10th Circuit in Case No. 06-5015. It was fully briefed on June 9, 2006 and argued on November 15, 2006 but no decision has yet issued.

> ...that neither the construction of this private trackage, nor BNSF Railway Company's ("BNSF") operation over the private trackage to serve PSO's generating station, was subject to the **Board's** jurisdiction. (Emphasis added.)

While all STB jurisdiction is federal, not all federal jurisdiction, even concerning railroads, is STB jurisdiction.[4] The federal preemption of the regulation of rail transportation is asserted by Congress, not the STB.

Respondent would have the Court ignore the fact that U.S.C. § 10501 (b) makes two things exclusive. One is the jurisdiction of the STB over rail transportation. The other, which Respondent is ignoring, is (Emphasis added.):

> Except as otherwise provided in this part, the **remedies** provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

The grant of eminent domain authority from the State of Oklahoma to PSO is a remedy. When Willis refused to grant PSO a railroad right of way across Willis' property, PSO exercised its remedy under state law and filed condemnation proceedings.

Likewise, exercising eminent domain for or against railroad rights of way is regulation. *Cherokee Nation v. Southern Kansas Railway Company*, 135 U.S. 641, 10 S. Ct. 965 (1890); *Wisconsin Central Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009 (W.D. Wis. 2000).

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[4] Each of the grade crossing on the track at issue has been assigned a federal identification number by the Federal Railroad Administration.

Respondent attempts to rely on *Dakota, Minnesota & Eastern Railroad Corp. v. South Dakota*, 362 F.3d 512 (8th Cir. 2004) but this reliance is misplaced. The 8th Circuit noted (Emphasis added.):

> DM&E applied to the federal Surface Transportation Board for authority under 49 U.S.C. § 10901 to construct new rail lines... DM&E's claim turns on whether the State has used the statute delegating its eminent domain power to regulate and control a **federally approved** railroad project.

Justice Stevens in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) at 2661 stated:

> On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad **with common-carrier duties** is a familiar example. (Emphasis added.)

In *Dakota*, the public necessity for track was determined by the STB and the state court was not adjudicating the public use or necessity of the track. In the case at bar, the public nature of the taking has never been adjudicated by either Congress, as in *Cherokee Nation v. Southern Kansas Railway Company* or the STB as in *Dakota*.

Willis challenged the public use of the taking and PSO, while denying any common-carrier status for the track at issue, asserts the public use requirement is met by the creation of competition between Union Pacific Railroad Company and BNSF to drive down interstate coal hauling rates. BNSF has attested that the existence of the track shifts several millions of dollars in annual revenues between them.

Creating competition between rival interstate common carriers to force rates down is economic regulation of rail transportation. On November 15, 2004 a state judge purports to have determined the public necessity to condemn a railroad bridge and track placed in interstate rail service in March of 1995 to create competition between rival interstate common carriers. These actions violate the federal preemption of remedies found at U.S.C. § 10501 (b) and constitute regulation of rail transportation.

There can be no question that the track at issue is property used in rail transportation. The 11th Circuit in *Florida East Coast Ry. V. City of West Palm Beach,* 266 F. 3d 1324 (11th Cir. 2001) at 1332-1136 gives an in depth review of the history of federal railroad regulation and makes it clear that federal regulation includes property owned by a shipper that is used under an agreement by a railroad company. As soon as the track at issue was constructed, it was turned over to BNSF pursuant to an "Industrial Track and Operating Agreement" under which BNSF has complete control of the track and controls all access to it. PSO may not even go on the track without permission from BNSF's dispatching center in Fort Worth, Texas. 49 U.S.C. §10102(6) (B) defines "railroad" to include "the road used by a rail carrier **or operated under an agreement.**" (Emphasis added.) The fact that the STB disclaims jurisdiction over the track does not mean state and local authorities do have authority to regulate it or that state remedies may be used to regulate it.In, *Cities of Auburn and Kent, Wa-Petition For Declaratory Order-Burlington Northern Railroad Company-Stampede Pass Line,* STB Finance Docket No. 33200 (July 1, 1997), 2 S.T.B. 330[5] the STB stated:

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[5] The decision may also be found at 1997 WL 362017.

> Petitioners complain that our decision in *King County* creates a regulatory void that Congress could not have intended. In such instances, according to the Cities, the states may impose their own oversight authority...As an example, petitioners maintain that states have residual regulatory authority over **spur** or switching tracks **that are excepted from our jurisdiction**...When sections 10906 and 10501(b) (2) are read together, it is clear that Congress intended to remove our authority over the entry and exit of these auxiliary tracks, **while still preempting state jurisdiction over them**...Thus, although **we may not regulate the construction and disposition of spur** and switching tracks, it is equally clear that **state and local authorities may not regulate those activities either..."**
> *Cities of Auburn and Kent, Wa.*, 2 S.T.B. 330 at 341, 342. (Emphasis added.)

See also *Fletcher Granite Company, LLC- Petition for Declaratory Order*, STB Finance Docket No. 34020 (served June 29, 2001) and *Flynn v. Burlington Northern Santa Fe Corporation*, 98 F. Supp. 2d 1186 (E.D. Wash. 2000). In *Flynn* the Court noted at 1189:

> The STB has addressed 49 U.S.C. § 10501 and 49 U.S.C. § 10906 and concluded that Congress intended that neither the STB nor local authorities could regulate the construction and disposition of spur and switching tracks, i.e. auxiliary tracks.

CONCLUSION

There is a conflict between the Circuits and state and federal courts concerning an important national issue. The Court should grant certiorari to resolve these conflicts.

Respectfully Submitted,

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